Supreme Court, U.S.
FILED

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No.

In the
SUPREME COURT
of the
UNITED STATES

October Term 1999

JOHN COYNE,

Petitioner,

v.

GARY MOHR,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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102 pp

QUESTIONS PRESENTED

I.

WHERE PROSECUTORIAL MISCONDUCT IS FOUND, CAN THE ISSUE OF PREJUDICE BE DISMISSED UPON A FINDING OF SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT?

II.

WHERE A CERTIFICATE OF PROBABLE CAUSE RELATES TO ALL ELEMENTS OF PETITIONER'S HABEAS CORPUS CLAIM, THE FAILURE OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT TO ADDRESS ALL OF PETITIONER'S ISSUES REQUIRES REVERSAL AND REMAND TO FULLY CONSIDER SUCH ISSUES.

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John Coyne,
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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner, John Coyne, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above titled proceeding on December 28, 1998.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit entered on December 28, 1998, under the caption Coyne v. Mohr, in unpublished form under the provisions of Sixth Circuit Rule 24. That determination is attached hereto in Appendix A, appendix p. 1.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 28, 1998. This petition for writ of certiorari has been filed and docketed within 90 days of that decision, as provided in Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §2254 and Supreme Court Rule 10, *et seq.*

CONSTITUTIONAL PROVISIONS INVOKED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property without due process of law;* nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the Constitution of the United

States provides:

> In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury of the State and district wherein the crime shall have been committed,* which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Both of these above amendments to the U.S. Constitution are applicable to the States, and particularly the State of Ohio, by virtue of the Fourteenth Amendment, which states:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.*
>
> ....

STATEMENT OF THE CASE

In a trial which commenced in Clermont County, Ohio, on February 11, 1982, John Coyne was tried for the murder of Phillip Osborne, under Ohio Rev. Code §2903.02, and for the attempted murders of Leslie Oberschlake and Anthony Dodson, under Ohio Rev. Code §§2903.02 and 2923.02(A). The jury acquitted Mr.

Coyne of the above charges, but instead, on February 23, 1982, found him guilty of felonious assault on Oberschlake and Dodson, Ohio Rev. Code §2903.11, as a lesser included offense of attempted murder. The jury had also been instructed on aggravated assault, a charge under Ohio Rev. Code §2903.12.

Mr. Coyne moved for judgment of acquittal or alternatively for a new trial March 17, 1982. On April 12, 1982, the court sentenced Mr. Coyne to two consecutive terms of three to fifteen years imprisonment, which sentences Mr. Coyne continues to serve.

Mr. Coyne subsequently appealed, with his trial counsel, Andrew Dennison, representing, and Mr. Coyne, through Mr. Dennison, raised the following assignments of error:

> 1. The trial court erred to the prejudice of defendant-appellant by denying his motion for mistrial based upon prosecutorial misconduct in closing argument, and thereafter denying his motion for new trial based on that misconduct, which denied to defendant his rights vested by the Fifth, Sixth, and Fourteenth Amendments of the Constitution of the United States resulting in a denial of a fair trial.
>
> 2. The trial court erred to the prejudice of the defendant-appellant by instructing the jury that the defendant must prove his claim of self-defense by a preponderance of the evidence and by instructing the jury that one of the essential elements of the crime of felonious assault: to do the act knowingly; was defined as being aware that the conduct will probably cause a certain result, "regardless of his purpose," in which the central issue of the case was whether defendant's

purpose was self-defense, and as subsequently raised and denied in his motion for judgment of acquittal, and alternatively, new trial, in which such instructions altered the burden of proof imposed upon the State of beyond a reasonable doubt, thereby denying to defendant his right of due process of law vested by the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. The trial court erred to the prejudice of the defendant-appellant by denying his motion for acquittal made at the close of the State's case in chief and made and renewed following the verdict, where the State's evidence established that the defendant's conduct was justified by law as to each and every offense, and the respective lesser included offenses, and the verdict and sentence must be set aside.

4. The verdict of the jury finding the defendant guilty of two counts of felonious assault is not sustained by sufficient evidence, the verdicts of the jury are contrary and inconsistent verdicts and as such are contrary to law.

The Ohio Court of Appeals affirmed the convictions on September 30, 1983. A Motion for the Ohio Supreme Court to accept jurisdiction to review the conviction, based upon essentially the same arguments, was denied on April 4, 1984. Certiorari to the United States Supreme Court was denied on October 1, 1984. Coyne v. Ohio, 469 U.S. 828, 105 S.Ct. 111 (1984).

Mr. Coyne filed a petition for habeas corpus regarding his appeal bond, which was denied on or about May 15, 1984.

On February 8, 1991, Mr. Coyne sought post-conviction relief under Ohio Rev. Code §2953.21, raising the following issues:

> 1. The jury charge on lesser-included offenses of voluntary manslaughter, felonious assault and aggravated assault permitted the jury to speculate improperly on compromised verdict.
>
> 2. Petitioner was denied effective assistance of appellate counsel bringing his appeal.

Relief was denied on March 7, 1991, by the Clermont County Court of Common Pleas, and no appeal was taken. An attempt to raise the ineffective assistance of appellate counsel by "motion for delayed reconsideration" to the Ohio Twelfth District Court of Appeals was denied on July 9, 1993. Motion for "delayed appeal" to the Ohio Supreme Court, was denied on September 14, 1994, on the grounds that delayed appeal was not permitted in civil matters.

The current petition for habeas corpus relief was filed *pro se* on October 18, 1994; the amended petition filed by counsel on June 14, 1996 raised the following grounds for relief:

> 1. The trial court's erroneous denial of the petitioner's motion for mistrial based on prosecutorial misconduct resulted in a violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United State constitution.
>
> 2. Instructions given to the jury regarding the mental culpability requirement of the offense of felonious assault, as codified by the State of Ohio, and the elements of self-defense, removed from the State the burden of proof beyond a reasonable

doubt as to the intent element of the offense and thereby denied petitioner his right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. The trial court's denial of petitioner's motion for acquittal based on insufficiency of evidence to sustain the verdict was a denial of his constitutional right to due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

4. The trial court erred in entering judgment on the verdicts of the jury, which were inconsistent and contrary to law, thereby denying petitioner his constitutional right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in its instructions to the jury regarding the lesser included offenses, resulting in a compromise of the jury verdict and thereby denied petitioner the right to due process of law, and the right [to] a fair and impartial trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

6. The trial court committed plain error by inviting the jury to compromise its verdict through faulty instructions, and failing to admonish the prosecution for engaging in misconduct.

7. Counsel for petitioner was ineffective in failing to assign as error, the trial court's abuse of discretion, commission of plain error, and the cumulative effect of the two intimately related

errors thereby denying petitioner the right to due process of law, and the effective assistance of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Relying on the Report and Recommendation of the United States Magistrate Judge, the District Court denied relief on September 4, 1997. The District Court issued an Order / Certificate of Appealability and/or Probable Cause on October 1, 1997, again at the urging of the United States Magistrate Judge.

Petitioner appealed the denial of his Petition for Habeas Corpus to the United States Court of Appeals for the Sixth Circuit.[1] Pursuant to the District Court's grant of a certificate of probable cause, Mr. Coyne raised four main arguments before the Sixth Circuit Court of Appeals.

I. When the state trial court informs counsel that he will direct a verdict against the state on a certain element of self-defense, but counsel for the state, knowing this, argues anyway in rebuttal to the jury that initiation of the confrontation was the accused's fault, and he further comments on the accused's right

---

1

The proceedings in the U.S. District Court took place under the heading of Coyne v. Russell. While the proceedings in the Sixth Circuit were pending, Mr. Coyne was transferred from a prison supervised by Warden Harry Russell to a prison supervised by Warden Gary Mohr. The Sixth Circuit Court of Appeals entered the name change in a margin entry on Petitioner Coyne's Motion to Substitute Gary Mohr, Warden, for Harry Russell, Warden as Party Respondent-Appellee. The change in name did not change the issues presented in any fashion.

to remain silent, his retention of counsel, and seeks to inflame the passions of the jury, the accused's right to a fair trial has been violated.

II. The jury instruction on felonious assault using the Ohio statutory definition of "knowingly" unconstitutionally precluded the jury from considering the instructions on self-defense, and alternatively transferred the burden of proof to the defense.

III. The trial court's denial of petitioner's motion for acquittal based on an insufficiency of the evidence to sustain the verdict was a denial of his constitutional right to due process of law.

IV. Where there are substantial reasons for and portions of the record supporting petitioner's grounds two and three for his petition, it was error for the district court to limit petitioner's certificate of Appealability to grounds one and six.

That Court, however, neglected to consider all of petitioner Coyne's arguments and, instead, only addressed the prosecutorial misconduct arguments raised in grounds 1 and 6 of the original petition for habeas corpus relief. The issues raised under headings two, three and four, *supra*, were completely ignored by the Sixth Circuit in their 3 page opinion which affirmed the decision of the U.S. District Court.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS RULING CONFLICTS WITH THIS COURT'S RULINGS ON THE STANDARDS FOR DETERMINING HARMLESS ERROR ON A FINDING OF PROSECUTORIAL MISCONDUCT.

The opinion below conflicts with this Court's rulings in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed. 353 (1993), Smith v. Phillips, 455 U.S. 209, 102 S.Ct. 940 (1982), and O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995).

The constitutional test for prejudice after a finding of prosecutorial misconduct is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht at 507 U.S. at 638, 113 S.Ct. at 1722.

The court below, while alluding to Sixth Circuit precedent, i.e. Pritchett v. Pitcher, 117 F.3d 959, 964 (6th Cir. 1997), which stated the standard to be whether the prosecutor's statements "had a bearing on the outcome of the trial," then used the following analysis:

> ... The prosecution presented evidence from which the jury could have concluded that Coyne knowingly caused physical harm to Oberschlake and Dodson by means of a deadly weapon. Accordingly, the prosecutor's closing statements were not, as a matter of law, so prejudicial as to deny Coyne a fair trial under any circumstances.

Appendix A, appendix p. 3.

This analysis is simply insufficient to meet the Brecht requirements. 507 U.S. 619, 113 S.Ct. 1710. Additionally, the test applied is not even the test stated in Pritchett. 117 F.3d 959 (6th Cir. 1997). The test applied is really something like the test for a directed verdict, and is insufficiently formulated to reach the "substantial and injurious effect" question which is the true measure of whether prejudicial and improper comments, which the District Court found, violated the accused's rights to a fair trial under the Fifth and Sixth Amendments to the Constitution of the United States.

Although the Court of Appeals did not apply the following test, it appears that the actual 6th Circuit test is whether the "prosecutorial misconduct is so pronounced and persistent that it permeates the entire atmosphere of the trial or is so gross as probably to prejudice the defendant." Pritchett, 117 F.3d at 964. Had the proper test been used, prejudice would have been found.

In analyzing the issue to determine whether relief should be granted the Magistrate Judge wrote, herein:

> Nevertheless, the Court is deeply troubled by the prosecutor's numerous comments on rebuttal to the effect that petitioner created the situation leading to the shootings.... The trial court advised the parties prior to closing arguments that it would instruct the jury as a matter of law that petitioner had established the element and "was not at fault in creating the situation in the salvage yard on August 28, 1981.' However, the prosecutor ignored the court and proceeded to repeatedly suggest otherwise in rebuttal closing argument, to which defense counsel had no opportunity to respond. The remarks were highly improper and flagrant.... In addition the remarks were extensive, constituting a substantial portion of the rebuttal

> argument.... Finally the remarks were deliberate....

Appendix F, appendix pp. 46-47.

Indeed, Mr. Coyne defended against all charges, i.e. murder, attempted murder, felonious assault, and aggravated Assault using the same defense, that being self-defense. The jury found Mr. Coyne not guilty of murder and attempted murder, but guilty of felonious assault. Since the evidence was the same on all of these, the question is why did the jury settle on guilty of felonious assault on Dodson and Oberschlake? One possible path the jury could have traversed is that they found Mr. Coyne guilty to appease the vociferous rebuttal argument of the State, that which has been determined to be misconduct. The petition for a writ should be granted.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE UNITED STATES MAGISTRATE JUDGE, WHOSE OPINION WAS ADOPTED BY THE DISTRICT COURT, SUBSTITUTED HIS JUDGMENT FOR THE FACT FINDER INSTEAD OF DETERMINING WHETHER THE PROSECUTORIAL MISCONDUCT SUBSTANTIALLY AFFECTED THE JURY.

In O'Neal v. McAninch, 513 U.S. 432, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995), this Court ruled that if a habeas court was in grave doubt about whether the petitioner was entitled to the writ, then the writ should have issued. But in the instant case the Magistrate Judge, who was aware of O'Neal, wrote the following:

> In sum, the Court concludes that although the prosecutor overstepped the bounds of propriety and engaged in flagrant misconduct when he

> repeatedly suggested to the jury that it could decide an element of self-defense resolved in petitioner's favor as a matter of law, the misconduct did not have a substantial injurious effect or influence in determining the jury's ultimate verdict of guilt on the lesser-included felonious assault offense to attempted murder. Although the jury was allowed to consider self-defense in reaching its verdict on the felonious assault offense, under the evidence presented at trial, it could not possibly have found that the use of deadly force against the fleeing victims, who concededly had created the situation by entering petitioner's junk yard to steal items, was justifiable. (emphasis added).
>
> In so concluding, the Court emphasizes that it does not condone the prosecutor's conduct during rebuttal closing argument, where numerous misleading, inflammatory and highly improper statements were made. Indeed, if petitioner had been convicted of murder or involuntary manslaughter with respect to the victim who was killed and of attempted murder with respect to the boys who were injured, "grave doubt" would exist as to whether the jury's judgment was swayed by the prosecutor's misconduct and the conviction would not be allowed to stand. [citations omitted]

Appendix F, appendix pp. 48-49.

Judge Hogan writes that had Mr. Coyne have been convicted of murder or attempted murder in relation to any of the intruders he would have had "grave doubt" about whether the verdict should have been allowed to stand. The only clue that exists as to why felonious assault should have been treated

differently than murder and attempted murder relates to Mr. Coyne "using" deadly force against "fleeing" victims.

But this idea that Mr. Coyne fired on a fleeing Mr. Dodson cannot be reconciled with the record which the Court of Appeals does not appear to have searched carefully. Nowhere does Mr. Dodson report being fired upon while "fleeing." The Magistrate Judge cited no page in the record where his supposition can be made concrete. The Court of Appeals failed to address this problem of the Magistrate Judge's faulty idea about Dodson being fired upon while fleeing. Without citing a single page of testimony, the Court of Appeals assumed that Dodson was fired upon while fleeing. The Court of Appeals wrote:

> ...Coyne advanced about thirty-two feet and fired another round of bullets from his rifle. Flying metal ricocheted from the second round of bullets, wounding both Dodson and Oberschlake....

Appendix A, appendix pp. 1-2. As to Mr. Dodson, the record does not support the above quotation from the Court of Appeals' decision.

Counsel has been unable to understand how there could be "grave doubt" on the more serious charges, but not on the lesser charges as to Dodson, with this hole in the record.

Where the results cannot be but close, and the jury clearly was making a "fine" judgment call on the mens rea or indeed self-defense as opposed to unreasonable force, how can it be said that improper argument amounting to prosecutorial misconduct did not have "substantial and injurious effect or influence in determining the jury's verdict." Ballistics evidence showed Mr. Coyne's second volley was made in a fan shaped pattern and at random, rather than such having been directed at Mr. Dodson. There is also little in the record to show that Obershlake was fired upon

while he was fleeing, but at least there is an allegation of such conduct. However, as to Mr. Dodson, there is nothing at all.

Ironically, and on top of this, the trial judge charged as follows as to self-defense on felonious assault:

> If you find that the state proved beyond a reasonable doubt all of the essential elements of the lesser crime of felonious assault as to counts two and three and after considering the elements with respect to self-defense and the charge as heretofore given to you by the Court with respect to self-defense, your verdict must be guilty.

With this kind of confusion reigning, how could the Magistrate Judge say that Mr. Coyne received a fair trial on felonious assault?

The elements of felonious assault include the concept of knowingly, defined in Ohio Rev. Code § 2901.22. *See* Appendix K, appendix p. 74. It is this interaction between "knowingly" and self-defense which the prosecutor's comments focused upon and which led the jury into a verdict of guilty.

Some thought must be given to the significant probability that these cumulative errors violated Mr. Coyne's constitutional rights. The petition for the writ should be granted.

III. THE SIXTH CIRCUIT COURT OF APPEALS FAILED TO ADDRESS MR. COYNE'S PROPERLY RAISED CLAIMS FOR RELIEF UNDER GROUNDS 2 AND 3 OF HIS PETITION FOR HABEAS CORPUS, AND SUCH FAILURE REQUIRES THAT THIS COURT VACATE THE SIXTH CIRCUIT'S DECISION AND REMAND THIS MATTER FOR FULL CONSIDERATION OF MR. COYNE'S CLAIMS.

The U.S. Magistrate Judge stated, unequivocably, that a certificate of probable cause should be issued to allow Mr. Coyne to pursue his claims to the U.S. District Court of Appeals for the Sixth Circuit. *See* Appendix F, appendix p. 67. The U.S. District Court subsequently issued such a certificate. *See* Appendix I, appendix p. 72. However, the Court of Appeals, for whatever reason, did not consider all of the issues Mr. Coyne raised on appeal. That court addressed the prosecutorial misconduct claim, but failed to consider or even comment upon the additional issues raised by Mr. Coyne. Such failure requires remand and vacation of the Sixth Circuit Court of Appeals decision.

The issue of whether a Certificate of Appealability or a Certificate of Probable Cause is proper has been addressed by this Court in Lindh v. Murphy, ___ U.S. ___, 117 S. Ct. 2059 (1997). This Court, in a 5-4 decision authored by Justice Souter, held that the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (signed on April 24, 1996) (hereinafter AEDPA of 1996) did not apply to petitions for habeas corpus which were pending at the time of the enactment of the Act. Id. at ___, 117 S. Ct. at 2061. Mr. Coyne filed his petition for habeas corpus in 1994, approximately two years prior to the effective date of the AEDPA of 1996.

This Act made considerable adjustment to U.S. Code Title 28, governing, *inter alia*, the procedure for filing and pursuing habeas corpus remedies in the Federal court system. Among these adjustments was the substitution of a certificate of Appealability in place of the former certificate of probable cause.

The basic standard for determining whether to issue a certificate remained unchanged, in that the appellant had to convince either the District Court or the Court of Appeals to grant a certificate because the appellant has demonstrated that he has "... made a substantial showing of a denial of a constitutional right." 28 U.S.C. §2253; *see also* Barefoot v. Estelle, 463 U.S. 880, 892-

93, 105 S. Ct. 3383, 3394 (1983). The U.S. Magistrate held, in the instant matter, that:

> This Court concludes that the prosecutorial misconduct issue presented in this case is subject to reasonable debate and could be resolved differently by the appellate court. The Court further finds that the questions raised are adequate to encourage petitioner to proceed to appellate review. Therefore, any application by petitioner for a certificate of probable cause should be GRANTED.

Appendix F, appendix p. 67 (footnote omitted). The U.S. Magistrate Judge went on to write that it was his opinion that a certificate of probable cause should issue upon application of the petitioner. Appendix F, appendix p. 68. The U.S. District Court Judge accepted these recommendations in their entirety. Appendix G, appendix p. 70.

— Under the former 28 U.S.C. §2253, a certificate of probable cause applies to all claims raised in a petition for habeas corpus relief, while a certificate of Appealability, which would be issued under the revised version of 28 U.S.C. §2253, after amendment by the AEDPA of 1996, mandates that the Court issue a certificate setting forth specific claims which are proper for further review.

The former 28 U.S.C. § 2253 provides as follows:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> There shall be no right of appeal from

> such an order in a proceeding to test the validity of an a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by State court, *unless the justice or judge issues a certificate of probable cause.*

(Emphasis added).

As stated previously, this Court's determination in Lindh that the AEDPA of 1996 amendments to habeas corpus practice were only applicable to petitions filed after the effective date of the AEDPA justifies the position that the certificate of probable cause issued by the U.S. District Court allows Mr. Coyne to present all of his claims to the Sixth Circuit Court of Appeals. Lindh at ___, 117 S. Ct. at 2061.

Mr. Coyne did so, arguing and presenting his claims regarding the jury instructions issued by the Court and the issue of sufficient evidence. However, these claims met with more than a blind eye at the Court of Appeals for the Sixth Circuit. They were simply ignored by that Court. Such inattention requires reversal. This Court should grant this petition to more fully address this issue.

CONCLUSION

Petitioner Coyne has been held for almost 15 years after a trial wherein the prosecution made significant prejudicial comments during the rebuttal portion of closing argument. These arguments addressed issues, such as burden of proof and the issues for the jury to decide, after the trial judge informed the prosecution that he was going to direct a verdict on certain issues, and not allow the jury to deliberate about those facts.

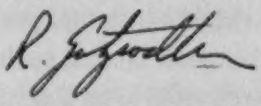
These comments have been classified as "highly improper," "misleading," "deliberate," and "flagrant" by the courts below, but the ultimate issue of whether these remarks had a substantial and prejudicial effect on the jury's verdict has never been addressed. In violation of accepted precedent, the Courts below have utilized a directed verdict or "weight of the evidence" standard regarding these prejudicial comments, denying Mr. Coyne his due process review of his conviction.

More due process violations occurred when the Sixth Circuit Court of Appeals failed to review, or even address, certain arguments properly raised by Mr. Coyne is his appeal of the denial of his petition for habeas corpus, filed prior to the enactment of the AEDPA of 1996.

Because of these series of inequities, this Court should grant the petition for a writ to firmly establish the standard for the federal courts when reviewing prosecutorial misconduct in state criminal proceedings, and to firmly establish that a certificate of probable cause is the proper vehicle for a U.S. District Court to

crtify for appeal the denial of a petition for habeas corpus filed prior to the effective date of the AEDPA of 1996.

Respectfully submitted,



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CERTIFICATE OF SERVICE

By my signature below, I hereby certify that three copies of the foregoing Petition for Writ of Certiorari has been served upon Betty Montgomery, Ohio Attorney General, at her offices, 30 E. Broad St., 26th Floor, Columbus, OH 43215 this 24th day of March, 1999 by regular U.S. Mail, postage pre-paid.

R. Gutzwiller

ROBERT GUTZWILLER

APPENDIX A - DECISION OF U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 97-4171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN COYNE,

Petitioner-Appellant,

v.

GARY MOHR, WARDEN,

Respondent-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BEFORE MARTIN, Chief Judge, NORRIS and BATCHELDER, Circuit Judges.

PER CURIAM. On August 27, 1981, Philip Osborne, Leslie Oberschlake, and Anthony Dodson drove to the Boot Hill Auto Graveyard where they stole radiators, batteries and a spare tire for Osborne's car. John Coyne owned and operated the junkyard. The noise woke Coyne, who had been sleeping in his truck in the junkyard. He went to investigate with a .380 caliber pistol, a Heckler and Koch semi-automatic rifle and a flashlight, and saw an indeterminable number of individuals coming toward him. When the group continued to advance, Coyne fired numerous times in their direction, wounding Osborne in the shoulder. Coyne advanced about thirty-two feet and fired another round of bullets from his rifle. Flying metal ricocheted from the

second round of bullets, wounding both Dodson and Oberschlake. Coyne then shot and fatally wounded Osborne in the chest as Osborne advanced toward him. A Clermont County, Ohio, jury acquitted Coyne of the murder of Osborne and the attempted murders of Oberschlake and Dodson, but found Coyne guilty of feloniously assaulting Oberschlake and Dodson. Coyne moved for judgment of acquittal or a new trial, but was sentenced to two consecutive three to fifteen-year terms of imprisonment, which he continues to serve.

At trial, the prosecutor made several inappropriate comments during his closing argument. First, he suggested that Coyne considered tampering with the evidence at the scene. Second, he suggested that Coyne was responsible for causing the confrontation when he knew that the court was going to instruct the jury that Coyne was not responsible. Finally, the prosecutor commented on Coyne's right to remain silent and his right to counsel. Coyne objected at trial only to the prosecutor's comments regarding tampering with the scene of the shooting. He objected to the other comments upon motion for a new trial.

The issue before this Court is whether the prosecutor's conduct during his closing argument rendered Coyne's conviction so constitutionally defective as to deny him due process of law. On appeal, the Ohio court did not address the allegedly improper comments to which Coyne failed to object at trial, concluding that he had waived his objection. The court did consider the prosecutor's remark regarding tampering with the scene of the shooting. The court concluded that while the prosecutor's comments came "dangerously close" to reversible error, they were not prejudicial to Coyne. *Ohio* v. *Coyne,* No.1154, 1983 WL 4498, at *5 (Ohio App 12 Dist. Sep 30, 1983) (unpublished opinion). The Ohio Supreme Court denied Coyne's motion to review the conviction. Coyne filed the current petition for habeas corpus relief, his fourth, on October 18, 1994, alleging that the

prosecutor's conduct at trial denied him due process of law. The district court referred the case to a magistrate and denied relief based on the recommendation of the magistrate.

This Court recently restated that the proper standard to apply when addressing claims of prosecutorial misconduct on habeas review is "whether the conduct was 'so egregious so as to render the entire trial fundamentally unfair." *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir. 1997) (quoting *Cook v. Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979)). To decide whether the trial was fundamentally unfair, "[t]his court must decide whether the prosecutor's statement likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt" *Pritchett*, 117 F.3d at 964 (quoting *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982)).

Coyne's claim of error is not correctable by federal habeas corpus review. The prosecutor's statements at trial, while not proper, resulted in harmless error in light of the evidence presented at trial and the decision reached by the jury. The prosecution presented evidence from which the jury could have concluded that Coyne knowingly caused physical harm to Obershlake and Dodson by means of a deadly weapon. Accordingly, the prosecutor's closing statements were not, as a matter of law, so prejudicial as to deny Coyne a fair trial under any circumstances.

The decision of the district court is AFFIRMED.

APPENDIX B - JUDGMENT ENTRY OF COURT OF COMMON PLEAS, CLERMONT COUNTY, OHIO

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO,	:	
	:	
PLAINTIFF,	:	CASE NO. S1-CR-5282
	:	
VS.	:	
	:	
JOHN COYNE,	:	JUDGMENT ENTRY
	:	ON JURY VERDICT
DEFENDANT.	:	

This case came on for trial before the Court of Common Pleas of Clermont County, Ohio on the 11th day of February, 1982, and the Defendant appeared in open court represented by counsel, Andrew Dennison, and the State of Ohio represented by Assistant Prosecutors, Jeffrey S. Schwartz and Richard P. Ferenc. A jury was duly empaneled and sworn, whereupon evidence was presented to the jury and upon conclusion of all the evidence on February 23, 1982, the Court instructed the jury as to the law applicable to the charges against the Defendant, to-wit: Count 1: Murder in violation of Section 2903.02; Count 2: Attempted Murder in violation of Sections 2923.03 and 2903.02(A), and the jury retired to the jury room to deliberate, and after due deliberations on the 25th day of February 1982, the jury returned to the Courtroom with their verdict signed by all twelve members of the jury, which verdict was a jury verdict finding the Defendant, John Coyne, not guilty of the offense of murder in Count No. 1 of the indictment; nor guilty of the offense of attempted murder in Count No. 2 of the indictment but guilty of the lesser included offense of felonious assault, contrary to and in violation of Section

2903.11 of the Ohio Revised Code, a second degree felony.

On the verdict of the jury the Court does hereby find the Defendant not guilty of the offense of murder in Count No. 1 of the indictment; guilty of the lesser included offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, a second degree felony in Count No. 2 of the indictment and of the lesser included offense of felonious assault, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, a second degree felony in Count No. 3 of the indictment.

IT IS THEREFORE ORDERED that a pre-sentence investigation report be conducted by the Probation Department, Clermont County, Ohio, and that said report be returned to the Court before sentence, which sentencing shall be set at a later date. Defendant's bond, if any, shall continue on the further condition that the Defendant shall not leave the State of Ohio during the pre-sentence investigation report.

/s/ John J. Watson
Judge John L. Watson
Common Pleas Judge

HAVE SEEN: /s/ Illegible
Assistant Prosecuting Attorney

APPENDIX C - ENTRY OF COURT OF COMMON PLEAS, CLERMONT COUNTY, OHIO SENTENCING DEFENDANT

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO,	:	
	:	
PLAINTIFF,	:	CASE NO. 81-CR-5282
	:	
VS.	:	
	:	
JOHN E. COYNE,	:	ENTRY SENTENCING
	:	DEFENDANT
DEFENDANT.	:	

The Defendant appeared in open court represented by counsel on the 6th April, 1982, the Defendant having heretofore been found guilty by a jury of the offense of felonious assault in Count No. 2 of the indictment, contrary to and in violation of Section 2903.11 of the Ohio Revised Code and guilty of the offense of felonious assault in Count No. 3 of the indictment, contrary to and in violation of Section 2903.11 of the Ohio Revised Code, both felonies of the second degree, and the defendant being now before the Court for sentencing was inquired of if he has anything to say or any good and sufficient reason why sentence should not be pronounced against him; and the Defendant having no good and sufficient reason why sentence should not be pronounced against him;

IT IS THEREFORE ORDERED, DECREED AND ADJUDGED that the Defendant be and hereby is sentenced to confinement in the Ohio State Penitentiary for not less than three years nor more than fifteen years in Count No. 2 of the indictment

and for a period of not less than three years nor more than fifteen years in Count No.3 of the indictment.

IT IS FURTHER ORDERED that the sentence imposed in Count 3 of the indictment shall be served consecutive to the sentence imposed in Count 2 of the indictment.

IT IS FURTHER ORDERED that stay of execution of said sentences be and hereby is granted pending appeal, and the Defendant's bond pending appeal is hereby set at $125,000.00, property.

Credit time allowed to Defendant, _____days.

The Clerk of Courts of Clermont County, Ohio is hereby appointed Trustee for the purpose of receiving allotments of the Defendant's earnings while confined in said penal institution under the sentence aforesaid, said allotments to be used for the purpose of paying costs in this action.

/s/ John Watson
Judge John L. Watson

HAVE SEEN:/s/ Illegible_____
Assistant Prosecuting Attorney

APPENDIX D - MEMORANDUM DECISION AND JUDGMENT ENTRY OF THE 12TH APPELLATE DISTRICT COURT OF APPEALS

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	CASE NO. CA 1154
- vs -	:	MEMORANDUM DECISION AND
JOHN E. COYNE	:	JUDGMENT ENTRY
Defendant-Appellant	:	

George E. Pattison, Prosecuting Attorney, 462 Main Street, Batavia, Ohio 45103, for Plaintiff-Appellee.

Andrew B. Dennison, 200 Main Street, Batavia, Ohio 45103, for Defendant-Appellant.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Clermont County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

APPENDIX D

Between 6:30 and 7:00 P.M. on the evening of August 27, 1981, Philip Osborne, age 18, drove to the home of an older man identified only as "Walter." Beside him on the front seat of his green 1971 Chrysler Newport were Leslie Oberschlake and Anthony Dodson, both age 16. The three had been working on Osborne's car most of the preceding afternoon and, after buying gasoline for the car and making a few other stops, arrived at Walter's mobile home located in Nicholsville, Ohio. Osborne, Oberschlake, and Dodson remained at the mobile home until approximately midnight, watching television, smoking marijuana, and drinking Little Kings Ale with Walter and his adult son.

When they left Walter and his son, the three boys were in the words of Dodson, "looking for something to do." It was too early to go home, especially as the night was in part a celebration of Dodson's and Osborne's birthdays. A collective decision was made to venture to appellant John Coyne's junkyard to steal some radiators, some batteries, and a spare tire for Osborne's car. They each had another bottle of ale and smoked more marijuana on the way.

The Boot Hill Auto Graveyard, owned and operated by appellant John Coyne, is located on sixty (60) acres of land fronting on Twelve Mile Road in Clermont County, Ohio. Osborne parked the Chrysler on a gravel lane across the road from the east gate of the junkyard, facing it toward the main road to facilitate escape. The doors and trunk of the car were left open. It was a warm, sticky, night without moon or stars. The gravel underfoot was moist and pliable; it had been drizzling rain most of the night and most of the previous day. Wisps of fog were present in the area where the car was parked, which was at the bottom of a slope rising toward the east gate of Boot Hill. There were no lights on in the junkyard.

Osborne led the way as the trio crossed Twelve Mile Road

and crawled under the east gate. Having worked part-time for Coyne for about a week in the past, Osborne was able to thread his way through the blackness and piles of salvage to where the batteries and radiators were piled near the office. Dodson and Oberschlake, who had never been to Boot Hill before, followed. Working quickly, the boys made three or four trips from the east gate to the office area and back carrying batteries and radiators, stacking them just outside the gate. The salvage parts were then carried across the road and loaded into the Chrysler: batteries in the trunk, radiators piled in the back seat.

One final item remained to be stolen: the spare tire for Osborne's car. At approximately 12:30 A.M. on August 28, 1981, the boys crossed Twelve Mile Road to make a second trip into the junkyard. As before, Osborne was in the lead, followed closely by Oberschlake and Dodson. They were not carrying lights or weapons of any kind.

Appellant John Coyne was no stranger to theft. His business had been victimized by repeated thefts for years, the last occurring two (2) months prior to August 28, 1981. Some of these incidents he had reported to the police; others he had not. In almost all of the cases in which the police had been called, the culprits had not been apprehended. Coyne had tried illuminating the junkyard at night, and tried hiring night watchmen, but the thievery continued. It was almost as if he was being watched. The incidents always seemed to occur when appellant had left for the day, despite his irregular hours. In fact, Coyne suspected that certain persons living near Boot Hill were responsible due to their proximity to the junkyard and resultant ability to monitor his comings and goings.

Driven by his admitted "paranoia" about thefts of his business property, John Coyne had taken to returning to Boot Hill after supper and sleeping there, hoping to apprehend persons

attempting to steal from him. His bed consisted of a mattress placed in the back of a junked "Dolly Madison" truck located a short distance from his office, where he kept valuable tools and radios. These were the items Coyne was most concerned about losing. The Dolly Madison truck also contained a number of guns and ammunition, including a Heckler and Koch .308 caliber semi-automatic rifle and a Mauser .380 caliber automatic pistol. Appellant stated that he had been sleeping in the back of the truck guarding his property every night since the last theft had occurred.

In the early morning of August 28, John Coyne was wakened by the sound of a foot on gravel. He thought he heard muffled voices. A car door slammed in the direction of the east gate of the junkyard. As quietly as possible, appellant pulled himself from the Dolly Madison truck and dressed. After placing the .380 caliber pistol in his pocket, Coyne picked up a flashlight and the Heckler and Koch semi-automatic rifle and cautiously went to investigate. He was unsure of the position of the person or persons who had awakened him, or the stage of their activities. He could have heard them as they were either entering or leaving the salvage yard.

Appellant made his way to the office, where his valuable tools and equipment were kept, and shined his light through the window. He checked the recently replaced lock on the door. Nothing appeared to be out of order. Satisfied that his office was secure, appellant shut off the light lest he be rendered an easy target for whoever might yet be in the junkyard. Coyne began to walk slowly toward the east gate, where he had heard the voices and the car door.

After walking an undetermined distance in the murky blackness, appellant saw three figures coming toward him. It was too dark to determine if they were armed, or even if they were only three in number. Appellant states that he fired a warning shot

with the rifle over the heads of the figures, and uttered words to effect of "stop" or "hold it there." When the lead figure continued to advance, appellant lowered the rifle and began to fire with the purpose of defending himself from impending attack. Coyne fired nine more rounds from this position wounding the leader, Osborne, in the shoulder. Appellant then, according to the evidence below, advanced some thirty-two (32) feet, passing the wounded Osborne, and fired the rifle ten more times in the direction of the east gate. After firing the second burst which had exhausted the rifle, appellant drew the Mouser pistol from his pocket and circled backward through a maze of salvage. At this point Coyne again came upon Osborne; who was continuing to advance toward him. Appellant fired the Mouser once, fatally wounding Osborne in the chest.

Dodson and Oberschlake testified that they had seen no one and heard no warnings before the first series of shots was fired. After initially diving for cover, both got up and ran toward the east gate of the junkyard. Although each received severe shrapnel wounds from the rifle fire, neither had been directly hit by Coyne's bullets. They met outside the gate and returned to Osborne's car. After waiting in the car for a period of time they elected to visit nearby houses in search of aid. The first house they tried was vacant, but at the second their knock was answered by a voice from an upstairs window. Sandy Weiner saw the two injured persons lying on her front porch and called the New Richmond Police Department.

Meanwhile, John Coyne was concerned about the other two shadows he had seen in the junkyard. He slid underneath the fence at the east gate and discovered Osborne's car, which featured the fresh blood of Oberschlake and Dodson, as well as the stolen batteries and radiators. Coyne cautiously slid back under the gate, unlocked his office, and telephoned the Clermont County Sheriff's Department to report a breaking and entering. Appellant also

telephoned his attorney. It was approximately 12:50 A.M.

Coyne then returned to the area in which the shooting took place and continued to search. He felt sure the other two were still in the vicinity of the east gate. Appellant then heard Dodson and Oberschlake pounding on the Weiner's front door. Still carrying the rifle and the flashlight, Coyne found the two wounded boys on the porch. He flashed the light in their eyes and advised them not to move on threat of death. After ascertaining that Dodson and Oberschlake were no longer dangerous to him, appellant returned to his office and telephoned the sheriff's office again to advise that there had been shootings and to request a life squad. It was approximately 1:04 A.M.

As a result of his encounter with appellant, Anthony Dodson received a compound fracture of his right ankle and numerous small wounds to the back and front of his torso and to his arms and legs. Metal fragments were found in his left arm, his legs, his chest and his back. He spent sixteen (16) days in the hospital recovering from the injuries above. Leslie Oberschlake received multiple lacerations to his face and scalp, two wounds to his left big toe, and a large laceration to his right knee. Metal was found imbedded in his scalp. Oberschlake was hospitalized for eight (8) days. Dodson and Oberschlake were both found guilty of theft offenses in juvenile court. Philip Osborne was pronounced dead on the scene, having sustained two gunshot wounds, one in the upper right arm and one in the chest.

On September 10, 1981, appellant John Coyne was indicted by the Grand Jury of Clermont County, Ohio, on one count of murder (count one) and two counts of attempted murder, (counts two and three). A trial by jury was commenced on February 11, 1982, and completed on February 23, 1982. On February 25, 1982, the jury announced its verdict, finding appellant not guilty of murder and not guilty of attempted murder,

but guilty of felonious assault ® C. 2903.ll) as to counts two and three. On April 12, 1982, appellant was sentenced to be confined in the Ohio State Penitentiary for not less than three (3) nor more than fifteen (15) years for each conviction, the sentences to be served consecutively. Execution of the sentencing order was stayed pending appellate review.

Appellant presents the following four assignments of error:

FIRST ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY DENYING HIS MOTION FOR MISTRIAL BASED UPON PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT, AND THEREAFTER DENYING HIS MOTION FOR NEW TRIAL BASED UPON THAT MISCONDUCT, WHICH DENIED TO DEFENDANT HIS RIGHTS VESTED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES RESULTING IN THE DENIAL OF A FAIR TRIAL.

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY INSTRUCTING THE JURY THAT THE DEFENDANT MUST PROVE HIS CLAIM OF SELF-DEFENSE BY A PREPONDERANCE OF THE EVIDENCE AND BY INSTRUCTING THE JURY THAT ONE OF

THE ESSENTIAL ELEMENTS OF THE CRIME OF FELONIOUS ASSAULT: TO DO THE ACT KNOWINGLY; WAS DEFINED AS BEING AWARE THAT THE CONDUCT WILL PROBABLY CAUSE A CERTAIN RESULT, "REGARDLESS OF HIS PURPOSE, IN WHICH THE CENTRAL ISSUE OF THE CASE WAS WHETHER DEFENDANT'S PURPOSE WAS SELF-DEFENSE, AND AS SUBSEQUENTLY RAISED AND DENIED IN HIS MOTION FOR JUDGMENT OF ACQUITTAL, AND ALTERNATIVELY, NEW TRIAL, IN WHICH SUCH INSTRUCTIONS ALTERED THE BURDEN OF PROOF IMPOSED UPON THE STATE BEYOND A REASONABLE DOUBT, THEREBY DENYING TO DEFENDANT HIS RIGHT OF DUE PROCESS OF LAW VESTED BY THE FIFTH AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

THIRD ASSIGNMENT OF ERROR:

TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY DENYING HIS MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CLOSE OF THE STATE'S CASE IN CHIEF AND AS MADE AND RENEWED FOLLOWING THE VERDICT, WHERE THE STATE'S EVIDENCE ESTABLISHED THAT THE DEFENDANT'S CONDUCT WAS JUSTIFIED BY LAW AS TO EACH AND EVERY OFFENSE, AND THE RESPECTIVE LESSER INCLUDED OFFENSES, AND THE VERDICT AND

APPENDIX D

SENTENCE MUST BE SET ASIDE.

FOURTH ASSIGNMENT OF ERROR:

THE VERDICT OF THE JURY FINDING THE DEFENDANT GUILTY OF TWO COUNTS OF FELONIOUS ASSAULT IS NOT SUSTAINED BY SUFFICIENT EVIDENCE, THE VERDICTS OF THE JURY ARE CONTRARY AND INCONSISTENT VERDICTS AND AS SUCH ARE CONTRARY TO LAW.

Appellant's first assignment of error asserts prejudicial prosecutorial misconduct on the part of the State of Ohio. The statements objected to occurred during closing argument and concern appellant's failure to contact the Clermont County Sheriff's Department until approximately twenty-five (25) minutes after he had shot Philip Osborne. The prosecutor stated that someone who had killed another in self-defense would immediately "run to the phone and say 'Oh my God I shot somebody. They were coming at me. They were attacking me.'" The prosecutor further stated that he suspected that Coyne was thinking about getting rid of Osborne's body during the twenty-five (25) minute period, and that Coyne might have used the twenty-five (25) minutes to re-arrange the scene of the shootings. Appellant in his brief refers to other allegedly inflammatory and prejudicial statements made during closing argument, but these statements were not specifically objected to below, and appellant has therefore waived his right to appeal the propriety of these statements. App. R. 12 (A).

A prosecuting attorney, as an agent of the people of the State of Ohio, has a duty to pursue conviction of persons guilty of crimes against the State with all appropriate zeal. State v. Morris (1954), 100 Ohio App. 307, 136 N.E.2d 653. However, arguments

to the jury must be confined to reasonable inferences which may be drawn from evidence presented. Morris, supra. Control of the arguments of counsel rests within the sound discretion of the trial judge, State v. Pustare (1973), 33 Ohio Ap. 2d 305, 295 N.E.2d 210, and advocates have traditionally been allowed great latitude in this respect. See Morris, supra, and Pustare, supra.

We feel that the statements made by the prosecutor and objected to below are dangerously close to reversible error. Such remarks constitute potentially inflammatory inferences which could not reasonably have been drawn from the evidence below. See Morris, supra. There was virtually no evidence presented indicating that the scene of the shooting had been tampered with by anyone, including appellant, or that appellant delayed contacting the sheriff due to any improper motive or intention.

However, all of the remarks by the prosecutor objected to below relate to appellant's conduct after shooting the deceased, Philip Osborne. As appellant was not found guilty of any wrongdoing with regard to Osborne's death, we conclude that the remarks were not prejudicial to appellant. We therefore decline to reverse the verdict below on the basis of such remarks. See Ramey v. Mets (1964), 3 Ohio App. 2d 329, 210 N.E.2d 449. Appellant's first assignment of error is therefore not well taken.

Appellant, in his second assignment of error, asserts that the effect of certain jury instructions given below was to require him to disprove an element of the crime with which he was charged in order to prove self-defense. We do not agree.

In a criminal prosecution, the State has the burden of proving each and every element of the offense with which the accused is charged beyond a reasonable doubt. In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068; Glenn v. Daliman (6th Cir. 1982), 686 F.2d 418. If the defendant asserts an affirmative

defense, the State may require the defendant to prove such defense by a preponderance of the evidence. R. C. 2901.05(A). See also, Krzeminski v. Perini (6th Cir. 1980), 614 F.2d 121, cert. denied 449 U.S. 866, 101 S.Ct. 199. However, the State may not presume that an element of a certain crime exists and then place, the burden of showing otherwise on the defendant. Krzeminski supra.

The crime of felonious assault is defined in R. C. 2903.11 as follows:

> (A) No person shall knowingly:
> (1) Cause serious physical harm to another;
> (2) Cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance
> . . . .
> (B) Whoever violates this section is guilty of felonious assault, a felony of the second degree....

The required mental state for the crime of felonious assault, is defined in R. C. 2901.22(B) as follows:

> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

In the case sub judice, the instruction which defined "knowingly" contained the statutory language set forth.

By asserting the affirmative defense of self-defense, appellant states in effect that there is justification for his admitted conduct. See State v. Poole (1973), 33 Ohio St. 2d 18, 294 N.E.2d

888. The defense is construed as an independent matter "which the defendant claims exempts him from liability even if it is conceded that the facts claimed by the prosecution are true." Poole, supra, at 19, 294 N.E.2d 15 889, citing, 1 Wharton's Criminal Evidence 54-55, Section 19 (12th Ed. 1955). To establish the defense of self-defense in Ohio, the defendant must show (1) that he was not at fault in creating the situation requiring him to defend himself, (2) that he believed he was in imminent danger of death or serious bodily harm, and that the only means of escape from such danger lay in the use of force, and (3) that he did not violate any duty to retreat from or avoid the danger. State v. Robbins (1979), 58 Ohio St. 2d 74, 388 N.E.2d 755.

Pleading and proving self-defense does not, as argued by appellant in his brief, require the negation of any of the elements of felonious assault. Appellant asserts that in order to prove self-defense he was required to disprove the "knowingly" element of the crime of felonious assault (R. C. 2903.11). He urges that because the definition of knowingly contains the language "regardless of his purpose," the burden of proof as to mental state shifts to a defendant attempting to plead self-defense, because such defendant is then required to prove that there was a purpose for his conduct, i.e. to protect his person. We do not find appellant's argument persuasive for two reasons. First, in order to prove self-defense, the accused is not required to state the purpose behind his actions. See Robbins, supra. Second, even assuming arguendo that proof of purpose is required in order to assert the defense of self-defense, the mental state required for felonious assault, "knowingly," is defined by statute in terms of conduct regardless of purpose. R. C. 2901.22(B), supra. If no purpose need be proven to obtain a conviction for felonious assault under R. C. 2903.11, requiring purpose to be proved to establish self-defense would not require the negation of an element of felonious assault, and could not be construed to violate appellant's right to due process of law.

Therefore, the jury was properly instructed below, and appellant's second assignment of error is overruled.

Appellant's third assignment of error takes issue with the refusal of the court below to grant appellant's motions for acquittal at the close of the State's case in chief and following the verdict.

A motion for acquittal must be denied if it appears that "reasonable minds may reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." State v. Bridgeman (1978), 55 Ohio St. 2d 261, 263,381 N.E.2d 184, 185. See also, State v. Brown (1981), 3 Ohio App. 3d 131, 443 N.E.2d 1382. Applying the standard above to the case sub judice, we find considerable controversy in the record with regard to a number of material elements of the crimes with which appellant was charged. For example, there is conflicting evidence as to whether or not appellant fired a warning shot before firing directly upon Osborne, Oberschlake, and Dodson. This factual dispute bears heavily on Coyne's mental state at the time of the shooting. The record also contains evidence indicating that appeallant pursued Oberschlake and Dodson as they fled from the junkyard following the first ten (10) rounds of rifle fire. Such conduct is inconsistent with appellant's claims of self-defense and defense of his property.

Therefore, being unable to find that a reasonable jury could only render a verdict in favor of appellant at the time his motions for acquittal were made, we must overrule appellant's assignment of error.

In his fourth assignment of error, appellant contends that the verdict rendered below finding him guilty of two counts of felonious assault is not sustained by sufficient evidence, and that the verdicts finding him not guilty as to the death of Osborne, yet guilty of felonious assault upon Oberschlake and Dodson, are

inconsistent and therefore contrary to law.

The crime of felonious assault (R. C. 2903.11) requires that the accused (1) knowingly, (2) cause physical harm to another by use of a deadly weapon. We find that there was sufficient competent credible evidence presented below going to each of the elements of the offense from which a jury could reasonably conclude that appellant was guilty beyond a reasonable doubt of each count of felonious assault. Therefore, we decline to reverse the convictions below on the basis that they are contrary to the manifest weight of the evidence. See State v. Eley (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132.

We also find appellant's assertion that the verdicts rendered in the instant case are inconsistent with each other unconvincing. Inconsistent verdicts with respect to separate charges against a single defendant do not constitute grounds for setting the decision of the jury aside. Harris v. Rivera (1981), 454 U.S. 339, 102 S. Ct. 460. Further, we think that the evidence presented supports the verdicts that were rendered. The jury could reasonably have found that appellant was acting in self-defense when he killed Osborne, who was leading the excursion into the junkyard, but was not acting in self-defense and using unjustified force as he continued to fire upon Dodson and Oberschlake as they ran from the scene of the confrontation.

Therefore, appellant's fourth assignment of error is not well taken.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of

Common Pleas of Clermont County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by his counsel, excepts.

HENDRICKSON, P.J., JONES and COOK, J.J.

Judge Robert E. Cook, of the Eleventh Appellate District, sitting by assignment of the Supreme Court of Ohio.

To the Clerk:
Enter upon the journal of the Court,
per Order of the Court.
By /s/ Hendrickson, J.
Presiding Judge

APPENDIX E - ENTRY OF OHIO SUPREME COURT DISMISSING APPEAL

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,	1984 TERM To wit: April 4, 1984
City of Columbus.	
State of Ohio,	No. 83-1702
Appellee	APPEAL FROM THE COURT OF APPEALS
vs.	For CLERMONT County
John E. Coyne,	
Appellant	

This cause, here on appeal as of right from the Court of Appeals for CLERMONT County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of Court of Appeals for CLERMONT County for entry.

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this _____ day of _____ 19____
_____ Clerk
_____ Deputy

APPENDIX F - REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John Coyne,
Petitioner

vs

Case No. C-1-94-704
(Beckwith, J.)

Harry Russell,
Respondent

REPORT AND RECOMMENDATION

Petitioner, an inmate in state custody at the Lebanon Correctional Institution in Lebanon, Ohio, brings this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the Court on the petition, as amended, petitioner's memorandum in support of the petition, and respondent's return of writ. (Docs. 1, 5, 28, 30). A status conference was held on June 4, 1997, and the matter is now ripe for ruling. In this noncapital habeas corpus case filed before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No.104-132, 110 Stat. 1214, the Court will review petitioner's claims for relief under the standards in effect prior to the AEDPA' 5 enactment. *See Lindh v. Murphy,* No.96-6298, 1997 WL 338568 (U.S. June 23, 1997).

Factual And Procedural Background

APPENDIX F

Petitioner was indicted by the Clermont County, Ohio grand jury on one count of murder as defined in Ohio Rev. Code § 2903.02, and two counts of attempted murder as defined in Ohio Rev. Code §§ 2903.02 and 2923.02(A). (Doc. 5, Ex. B). After trial commencing on February 11 and ending February 23, 1982, a jury acquitted petitioner on the murder and attempted murder charges, but found him guilty of two counts of felonious assault as defined in Ohio Rev. Code § 2903.11, which is a lesser included offense to attempted murder. *(Id.*, Ex. A). On April 12, 1982, the court sentenced petitioner to two consecutive (3) to fifteen (15) year terms of imprisonment for the felonious assault convictions. *(Id.*, Ex. C)

With the assistance of his trial counsel, petitioner filed a direct appeal to the Ohio Court of Appeals, Twelfth Appellate District. The Ohio Court of Appeals made the following findings of fact regarding the circumstances leading to petitioner's conviction, which are entitled to a presumption of correctness:[1]

> Between 6:30 and 7:00 P.M. on the evening of August 27, 1981, Philip Osborne, age 18, drove to the home of an older man identified only as "Walter." Beside him on the front seat of his green 1971 Chrysler Newport were Leslie Oberschlake and Anthony Dodson, both age 16. The three had been working on Osborne's car most of the

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The statutory provision applicable to this case, which was contained in the version of 28 U S.C. § 2254(d) in effect prior to the AEDPA's enactment, set forth eight circumstances in which the presumption of correctness is not to be accorded a state court's findings of fact. The eight circumstances set forth in the prior law are not present in this case.

preceding afternoon and, after buying gasoline for the car and making a few other stops, arrived at Walter's mobile home located in Nicholsville, Ohio. Osborne, Oberschlake, and Dodson remained at the mobile home until approximately midnight, watching television, smoking marijuana, and drinking Little Kings Ale with Walter and his adult son.

When they left Walter and his son, the three boys were, in the words of Dodson, "looking for something to do." ... A collective decision was made to venture to appellant John Coyne's junkyard to steal some radiators, some batteries, and a spare tire for Osborne's car. They each had another bottle of ale and smoked more marijuana on the way.

The Boot Hill Auto Graveyard, owned and operated by appellant John Coyne, is located on sixty (60) acres of land fronting on Twelve Mile Road in Clermont County, Ohio. Osborne parked the Chrysler on a gravel lane across the road from the east gate of the junkyard, facing it toward the main road to facilitate escape. The doors and trunk of the car were left open. It was a warm, sticky, night without moon or stars. The gravel underfoot was moist and pliable; it had been drizzling rain most of the night and most of the previous day. Wisps of fog were present in the area where the car was parked, which was at the bottom of a slope rising toward the east gate of Boot Hill. There were no lights on in the junkyard.

Osborne led the way as the trio crossed Twelve Mile Road and crawled under the east gate. Having worked part-time for Coyne about a week in the past, Osborne was able to thread his way through the blackness and piles of salvage to where the batteries and radiators were piled near the office. Dodson and Oberschlake, who had never been to Boot Hill before, followed. Working quickly, the boys made three or four trips from the east gate to the office area and back carrying batteries and radiators, stacking them just outside the gate. The salvage parts were then carried across the road and loaded into the Chrysler: batteries in the trunk, radiators piled in the back seat.

One final item remained to be stolen: the spare tire for Osborne's car. At approximately 12:30 A.M. on August 28, 1981, the boys crossed Twelve Mile Road to make a second trip into the junkyard. As before, Osborne was in the lead, followed closely by Oberschlake and Dodson. They were not carrying lights or weapons of any kind.

Appellant John Coyne was no stranger to theft. His business had been victimized by repeated thefts for years, the last occurring two (2) months prior to August 28, 1981. Some of these incidents he had reported to the police; others he had not. In almost all of the cases in which the police had been called, the culprits had not been apprehended. Coyne had tried illuminating the junkyard at night, and tried hiring night watchmen, but the thievery continued. It was

almost as if he was being watched. The incidents always seemed to occur when appellant had left for the day, despite his irregular hours. In fact, Coyne suspected that certain persons living near Boot Hill were responsible due to their proximity to the junkyard and resultant ability to monitor his comings and goings.

Driven by his admitted "paranoia" about thefts of his business property, John Coyne had taken to returning to Boot Hill after supper and sleeping there, hoping to apprehend persons attempting to steal from him. His bed consisted of a mattress placed in the back of a junked "Dolly Madison" truck located a short distance from his office, where he kept valuable tools and radios. These were the items Coyne was most concerned about losing. The Dolly Madison truck also contained a number of guns and ammunition, including a Heckler and Koch .308 caliber semi-automatic rifle and a Mauser .380 caliber automatic pistol. Appellant stated that he had been sleeping in the back of the truck guarding his property every night since the last theft had occurred.

In the early morning of August 28, John Coyne was wakened by the sound of a foot on gravel. He thought he heard muffled voices. A car door slammed in the direction of the east gate of the junkyard. As quietly as possible, appellant pulled himself from the Dolly Madison truck and dressed. After placing the .380 caliber pistol in his pocket, Coyne picked up a flashlight and the Heckler and Koch semi-automatic rifle and cautiously went to investigate. He was unsure of

the position of the person or persons who had awakened him, or the stage of their activities....

Appellant made his way to the office, where his valuable tools and equipment were kept, and shined his light through the window. He checked out the recently replaced lock on the door. Nothing appeared to be out of order. Satisfied that his office was secure, appellant shut off the light lest he be rendered an easy target for whoever might yet be in the junkyard. Coyne began to walk slowly toward the east gate, where he had heard the voices and the car door.

After walking an undetermined distance in the murky blackness, appellant saw three figures coming toward him. It was too dark to determine if they were armed, or even if they were only three in number. Appellant states that he fired a warning shot with the rifle over the heads of the figures, and uttered words to the effect of "stop" or "hold it there." When the lead figure continued to advance appellant lowered the rifle and began to fire with the purpose of defending himself from impending attack. Coyne fired nine more rounds from this position, wounding the leader, Osborne, in the shoulder. Appellant then, according to the evidence below, advanced some thirty-two (32) feet, passing the wounded Osborne, and fired the rifle ten more times in the direction of the east gate. After firing the second burst which had exhausted the rifle, appellant drew the Mouser [sic] pistol from his pocket and circled backward through a maze of salvage. At this point Coyne again came upon Osborne, who was continuing to

advance toward him, Appellant fired the Mouser [sic] once, fatally wounding Osborne in the chest.

Dodson and Oberschlake testified that they had seen no one and heard no warnings before the first series of shots was fired. After initially diving for cover, both got up and ran toward the east gate of the junkyard. Although each received severe shrapnel wounds from the rifle fire, neither had been directly hit by Coyne's bullets. They met outside the gate and returned to Osborne's car. After waiting in the car for a period of time, they elected to visit nearby houses in search of aid. The first house they tried was vacant, but at the second their knock was answered by a voice from an upstairs window. Sandy Weiner saw two injured persons lying on her front porch and called the New Richmond Police Department.

Meanwhile, John Coyne was concerned about the other two shadows he had seen in the junkyard. He slid underneath the fence at the east gate and discovered Osborne's car, which featured the fresh blood of Oberschlake and Dodson, as well as the stolen batteries and radiators. Coyne cautiously slid back under the gate, unlocked his office, and telephoned the Clermont County Sheriff's Department to report a breaking and entering. Appellant also called his attorney. It was approximately 12:50 A.M.

Coyne then returned to the area in which the shooting took place and continued to search. He felt sure the other two were still in the vicinity of the east gate. Appellant then heard Dodson and

> Oberschlake pounding on the Weiner's front door. Still carrying the rifle and the flashlight, Coyne found the two wounded boys on the porch. He flashed the light in their eyes and advised them not to move on threat of death. After ascertaining that Dodson and Oberschlake were no longer dangerous to him, appellant returned to his office and telephoned the sheriff's office again to advise that there had been shootings and to request a life squad. It was approximately 1:04 AM.
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> As a result of his encounter with appellant, Anthony Dodson received a compound fracture of his right ankle and numerous small wounds to the back and front of his torso and to his arms and legs. Metal fragments were found in his left arm, his legs, his chest, and his back. He spent sixteen (16) days in the hospital recovering from the injuries above. Leslie Oberschlake received multiple lacerations to his face and scalp, two wounds to his left big toe, and a large laceration to his right knee. Metal was found imbedded in his scalp. Oberschlake was hospitalized for eight (8) days. Dodson and Oberschlake were both found guilty of theft offenses in juvenile court. Philip Osborne was pronounced dead on the scene, having sustained two gunshot wounds, one in the upper right arm and one in the chest.

(Id., Ex. D, pp.2-8).

Petitioner raised the following assignments of error to the Ohio Court of Appeals:

> 1. The trial court erred to the prejudice of

defendant-appellant by denying his motion for mistrial based upon prosecutorial misconduct in closing argument, and thereafter denying his motion for new trial based on that misconduct, which denied to defendant his rights vested by the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States resulting in a denial of a fair trial.

2. The trial court erred to the prejudice of the defendant-appellant by instructing the jury that the defendant must prove his claim of self-defense by a preponderance of the evidence and by instructing the jury that one of the essential elements of the crime of felonious assault: to do the act knowingly; was defined as being aware that the conduct will probably cause a certain result, "regardless of his purpose," in which the central issue of the case was whether defendant's purpose was self-defense, and as subsequently raised and denied in his motion for judgment of acquittal, and alternatively, new trial, in which such instructions altered the burden of proof imposed upon the State of beyond a reasonable doubt, thereby denying to defendant his right of due process of law vested by the Fifth and Fourteenth Amendments of the Constitution of the United States.

3. The trial court erred to the prejudice of the defendant-appellant by denying his motion for acquittal made at the close of the State's case in chief and as made and renewed following the verdict, where the State's evidence established that the defendant's conduct was justified by law as to

> each and every offense, and the respective lesser included offenses, and the verdict and sentence must be set aside.
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> 4. The verdict of the jury finding the defendant guilty of two counts of felonious assault is not sustained by sufficient evidence, the verdicts of the jury are contrary and inconsistent verdicts and as such are contrary to law.

(Id., pp. 8-10). On September 30, 1983, the Court of Appeals overruled the assignments of error and affirmed the judgment of conviction. *(Id.*, pp.10-17).

Petitioner's counsel filed a notice of appeal and a memorandum in support of jurisdiction in the Ohio Supreme Court, raising essentially the same claims that he had presented to the Ohio Court of Appeals. (Id., Ex. E). By separate entries issued April 4, 1984, the Ohio Supreme Court overruled petitioner's motion for leave to appeal and sua sponte dismissed the appeal "for the reason that no substantial constitutional question exists herein." *(Id.*, Ex. G).

Apparently, petitioner attempted a further appeal to the United States Supreme Court. On October 1, 1984, the Supreme Court denied certiorari. (Doc. 28, p.3, ¶ 9(f)).

Petitioner also attempted to file habeas corpus petitions pursuant to 28 U.S.C. § 2254 with this Court. In the first petition, petitioner did not challenge the validity of his conviction, but rather the trial court's revocation of bail pending appeal while petitioner was attempting to contest his conviction in the United States Supreme Court. On May 15, 1984, the District Court denied the petition on exhaustion grounds. (Doe. 5, Ex, H). Petitioner's second petition, filed by a "friend" of petitioner, was

dismissed without prejudice on April 1, 1986 *(Id.,* Ex. I). Petitioner's third petition was also dismissed without prejudice on exhaustion grounds. *(Id.,* Exs. M, N).

On February 8, 1991, while petitioner's third habeas corpus petition was pending in this Court, petitioner filed a post-conviction petition pursuant to Ohio Rev. Code § 2953.21 in the Clermont County Common Pleas Court, raising the following grounds for relief:

> 1. The jury charge on lesser-included offenses of voluntary manslaughter, felonious assault and aggravated assault permitted the jury to speculate improperly on compromised verdict.
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> 2. Petitioner was denied effective assistance of appellate counsel in bringing his appeal.

On March 7, 1991, the Common Pleas Court issued a decision dismissing the petition on the grounds that the first issue was barred from review under the *res judicata* doctrine because it could have been raised on direct appeal and the second issue was not reviewable in state post-conviction proceedings. *(Id.,* Ex. J). Petitioner did not seek to appeal the Common Pleas Court's decision to the Ohio appellate courts.

On September 20, 1991, petitioner filed a second post-conviction petition pursuant to Ohio Rev. Code § 2953.21 in the Clermont County Common Pleas Court, again raising an ineffective assistance of appellate counsel claim. *(Id.,* Ex. K). The trial court dismissed the petition on October 2, 1991. *(Id.,* Ex. L).

Finally, petitioner attempted to raise an ineffective assistance of appellate counsel claim to the Ohio Court of Appeals, Twelfth Appellate District, by way of a motion for

delayed reconsideration. The Court of Appeals denied the motion on July 9, 1993. *(Id.* Ex. 0). Almost two months later, on September 6, 1993, petitioner filed a motion for delayed appeal in the Ohio Supreme Court. *(Id.*, Ex. P). On September 14, 1994, the Ohio Supreme Court issued an order sua sponte striking the motion for delayed appeal on the ground "[t]his appeal involves a civil, post-conviction matter and not an appeal of a felony case to which the provisions for delayed appeal in S. Ct. Prac. R. II, Section A(4), apply," and further ordering sua sponte that "in that appellant failed to perfect an appeal pursuant to S. Ct. Prac R. II, Section 2(A)(l), this case be, and hereby is, dismissed for lack of jurisdiction." *(Id.*, Ex. Q).

On October 18, 1994, petitioner filed this petition for a writ of habeas corpus pro se. (Doc. 1). Counsel, who was later retained by petitioner, filed an amended petition on June 14, 1996, raising the following grounds for relief stemming from the claims originally asserted by petitioner in his pro se petition:

> 1. The trial court's erroneous denial of the petitioner's motion for mistrial based on prosecutorial misconduct resulted in a violation of his rights to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.
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> 2. Instructions given to the jury regarding the mental culpability requirement of the offense of felonious assault, as codified by the State of Ohio, and the elements of self-defense, removed from the State the burden of proof beyond a reasonable doubt as to the intent element of the offense and thereby denied petitioner his right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

3. The trial court's denial of petitioner's motion for acquittal based on insufficiency of evidence to sustain the verdict was a denial of his constitutional right to due process of law in violation of the Fifth And Fourteenth Amendments to the United States Constitution.

4. The trial court erred in entering judgment on the verdicts of the jury, which were inconsistent and contrary to law, thereby denying petitioner his constitutional right to due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

5. The trial court erred in its instructions to the jury regarding the lesser included offenses, resulting in a compromise of the jury verdict and thereby denied petitioner the right to due process of law, and the right [to] a fair and impartial trial in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

6. The trial court committed plain error by inviting the jury to compromise its verdict through faulty instructions, and failing to admonish the prosecution for engaging in misconduct.

7. Counsel for petitioner was ineffective in failing to assign as error, the trial court's abuse of discretion, commission of plain error, and the cumulative effect of the two intimately related errors thereby denying petitioner the right to due process of law, and the effective assistance of counsel, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States

Constitution.

(Doc. 28).

OPINION

A. Petitioner's Prosecutorial Misconduct Claim Alleged In Grounds One And Six Lacks Merit

In Grounds One and Six of the petition, petitioner claims he was denied a fair trial based on the prosecutor's misconduct in rebuttal closing argument. (Docs. 1, 28).

First, petitioner contends that although the court had ruled as a matter of law and instructed the jury that petitioner played no part in creating the situation giving rise to the events at the salvage yard, which is an element necessary to establish self-defense (see Doc, 14, p. 897), the prosecutor repeatedly suggested otherwise on rebuttal. Petitioner particularly challenges the following comments by the prosecutor:

> He certainly wasn't out there trying to protect his property. Have you seen how people protect their property? ... People who want to protect their property have the area well lit, they have the area well lit so people won't go in there. . . . *(Id.*, p. 882).
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> I think there's only one reason he was out there for sixty days. He was in the Dolly Madison truck with these weapons . . . . But there's only one reason he'd be out in a Dolly Madison truck in the complete black with a weapon like this and a spare magazine. And that's because, ladies and gentlemen, you are out there to confront the thieves who come in and you're out there to

> punish those thieves. . . He was luring them and hunting them when they got in there. *(Id.* pp. 884-85).
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> . . . .[Y]ou decide if he has prove it to you . . . that he was not the aggressor, that he did not provoke the confrontation and cause the injury, that he wasn't out here sixty days waiting, waiting for a confrontation. . . . And he would have stayed out there longer underneath his electric blanket as the fall wore on until a confrontation took place. And now, ladies and gentlemen, the defendant tells us that, Now that I've got my confrontation, now that I'm on my own property in the pitch black," he comes to us and complains about it and he says it was a hell hole out there. It was a hell hole because he created a confrontation, he created the darkness, he created the weapons, he created the situation that would draw in thieves. (Id., pp. 885-86).

Second, petitioner objects to the following comments made by the prosecutor in support of the theory that petitioner did not call the police until approximately twenty-five minutes after the shootings because he was thinking about getting rid of Osborne's body and rearranging the scene:

> Now, Phil [Osborne] went in with his glasses. You look at those glasses. I put them on and his eyes weren't much worse than mine, and there's no way, no way I would think of taking off my glasses because I can barely see you all. . . *(Id.,* p. 880).
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> . . . I submit to you he took twenty-five minutes

> deciding what he was going to do. And he looked and he realized, "Well, I'm not Jesus Christ, I guess I can't bring him back to life." And he said, "Well, I'm not Harry Houdini, I can't make the body disappear,". . . And I suspect that he was thinking at that point about getting rid of the body And it's to [petitioner's trial attorney's] credit when he arrived on the scene the body didn't disappear. (Id., pp. 888-89)

Petitioner argues these comments were inflammatory and improperly reflected the prosecutor's personal opinion. Petitioner also claims the prosecutor improperly commented on petitioner's failure to testify or on his right to remain silent in the face of police questioning by suggesting petitioner did not "answer many questions" when he spoke to police "in the presence of counsel, after consulting with counsel." *(Id.,* pp. 889-90).

Finally, petitioner challenges certain other comments made by the prosecutor as improper "appeals to the passion and prejudice of the jury." (Doc. 30, p. 12). Specifically, petitioner objects to the prosecutor's remark that "[m]aybe what we should do is stand up here and give Mr. Coyne a medal and say congratulations, you're a lousy shot" for not hitting Dodson or Oberschlake with bullets. (Doc. 14, p. 879). Petitioner also objects to the prosecutor's last words to the jury that "if you can find one honest reason why he didn't use any one of the other alternatives open to him other than to kill those thieves, then you acquit him and you find him not guilty and maybe you should elect him sheriff." *(Id* p. 890).

At trial, petitioner's counsel moved for a mistrial at the close of the rebuttal argument on the stated ground that the prosecutor's remarks "dealing with the removal of the body if he [petitioner] could, with twenty-five minutes to rearrange the crime

scene and do other things," were improper. *(Id.*, p. 891). The trial court overruled the motion. *Id.* On direct appeal, the Ohio Court of Appeals only addressed the portion of the prosecutorial misconduct claim involving the comments made to advance the prosecution's theory about the twenty-five *(25)* minute lapse in time before petitioner called the police. (Doc. 5, Ex. D, p. 10). The Court of Appeals ruled that "other allegedly inflammatory and prejudicial statements made during closing argument" that petitioner's counsel sought to challenge on appeal "were not specifically objected to below, and appellant has therefore waived his right to appeal the propriety of these statements. App. R. 12(A)." *Id.*

As an initial matter, respondent argues that petitioner has waived the portion of the prosecutorial misconduct claim that was not addressed on the merits by the Ohio Court of Appeals. (Doc. 5, pp.6-9). On federal habeas corpus review of a state conviction, the court is precluded from considering an issue of federal law if the state court judgement rests on a state-law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the state court's decision. *Harris v. Reed,* 489 U.S. 255, 260-62 (1989) The adequate and independent state ground doctrine has been applied to state decisions refusing to address the merits of a federal claim because of violations of state procedural rules, including the failure to make a timely objection at trial. *Id.* at 261; *Wainright v. Sykes,* 433 U.S. 72, 86-87 (1977); see also *McBee v. Grant*, 763 F.2d 811, 813 (6th Cir. 1985). In this case, although petitioner concedes he only presented a portion of his prosecutorial misconduct claim in his motion for mistrial made prior to jury deliberations, he has submitted evidence showing he did assert the claims to the trial court in a "motion for judgment of acquittal and in the alternative, motion for a new trial," filed after the jury's verdict. (Doc. 30, Ex. I). This evidence raises concerns about the adequacy of the state appellate court's finding of waiver based on petitioner's failure to raise objections below. Therefore,

this Court assumes, without deciding, that because petitioner presented his entire prosecutorial misconduct claim to the trial court in his post-verdict motion for judgment of acquittal, he has not waived the claim for the purpose of federal habeas corpus review.

The scope of federal habeas corpus review of prosecutorial misconduct claims is narrow. On habeas corpus review of a state conviction, the federal court does not sit as an appellate court with supervisory power to rectify general trial errors. *Donnelly v. DeChristoforo,* 416 U.S. 637, 642 (1974); *see also Cook v. Bordenkircher,* 602 F.2d 117, 119 (6th Cir.), *cert. denied,* 444 U.S. 936 (1979). Where no specific constitutional right is alleged to have been infringed by the prosecutor's conduct, a claim of prosecutorial misconduct is one of ordinary trial error, which does not rise to the level of a constitutional violation unless the misconduct "so infected the trial with unfairness as to render the resulting conviction a denial of due process." *Donnelly,* 416 U.S. at 642-43; *see also Darden v. Wainwright.* 477 U.S. 168, 181 (1986). When a petitioner raises a prosecutorial misconduct claim, "the touchstone of due process analysis . . . is the fairness of the trial, not the culpability of the prosecutor." *Serra v. Michigan Dep't of Corrections,* 4 F.3d 1348, 1355 (6th Cir. 1993) (quoting *Smith v. Phillips,* 455 U.S. 209, 219 (1982)), *cert. denied,* 510 U.S. 1201(1994). Habeas corpus relief may not be granted unless the prosecutor's conduct was "so egregious so as to render the entire trial fundamentally unfair." *Id.* (quoting *Cook,* 602 F.2d at 119). A prosecutor's remarks must be examined within the context of the entire trial to determine whether they deprived a defendant of a fair trial. *United States v. Young,* 470 U.S. 1, 11-12 *(1985); see also Angel v. Overberg,* 682 F.2d 605, 608 (6th Cir. 1982) (en banc).

Instructive in analyzing whether a prosecutor's conduct amounts to constitutional error is the test set forth in *United States*

v. Bess, 593 F.2d 749 (6th Cir. 1979), which the Sixth Circuit applies when reviewing prosecutorial misconduct claims in its capacity as an appellate court with supervisory power to correct the alleged error. *See United States v. Blandford,* 33 F.3d 685, 708 (6th Cir. 1994), *cert. denied,* 115 S.Ct. 1821(1995); *United States v. Carroll,* 26 F.3d 1380, 1387 (6th Cir. 1994). The *Bess* approach involves a two step inquiry: (1) whether the remarks at issue were improper, and if so, (2) whether the impropriety constitutes reversible error. *Bess,* 593 F.2d at 756-57, *see also Blandford,* 33 F.3d at 708; *Carroll,* 26 F.3d at 1385. Under the second step of the inquiry, the alleged misconduct usually will not amount to reversible error if "it is not flagrant, where proof of guilt is overwhelming, where counsel does not object and/or where the trial judge steps in and admonishes the jury." *Blandford,* 33 F.3d at 708 (quoting *Bess,* 593 F.2d at 757). Factors to consider in determining whether the challenged conduct is "flagrant" include the degree to which the alleged misconduct may tend to mislead the jury and prejudice the accused; whether the alleged misconduct was isolated or extensive; and whether the alleged misconduct was deliberate. *Carroll,* 26 F.3d at 1385-86, 1398-90 (citing *United States v. Leon,* 534 F.2d 667, 679 (6th Cir. 1976)).

Where the error is not flagrant, reversal is inappropriate if proof of defendant's guilt is overwhelming; *or* defense counsel failed to object to the error; *or* the trial court cured the error with an admonishment to the jury. *Id.* at 1385-86 and n.5, 1390. On the other hand, where the challenged conduct is flagrant, *Bess* left open the possibility that such misconduct in itself may constitute reversible error even if proof of guilt is overwhelming, the defendant did not object to the error and the court issued curative instructions to the jury. *Id.* at 1385 n.5. There also are rare cases where a single misstep on the part of the prosecutor may be so destructive of the right to a fair trial that reversal is mandated" *Id.* at 1387 (quoting *United States v. Solivan,* 937 F.2d 1146, 1150(6thCir. 1991)).

In all but exceptional cases involving such alleged trial error, the determination turns on whether, in light of the record as a whole, the misconduct had a "substantial and injurious effect or influence in determining the jury's verdict."[2] *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993) (adopting the standard of review enunciated in *Kotteakos v. United States*, 328 U.S. *750* (1946), for federal habeas corpus review of state convictions); *Berkev v. Makowski*, 106 F.3d 400 (table), No. 96-1051, 1997 WL 14420 (6th Cir. January 14, 1997); *cf. Young*, 470 U.S. at 16-17 n.13 (only where the claimed error has "an unfair prejudicial impact on the jury's deliberations" would the court "be able to conclude that the error undermined the fairness of the trial and contributed to a miscarriage of justice" for purposes of application of the "plain error" doctrine)

> [T]he question is not were [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon

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In an unusual case, a deliberate and especially egregious error of the trial type, or one that is combined with a pattern of prosecutorial misconduct, might so infect the integrity of the proceeding as to warrant habeas corpus relief even if it did not substantially influence the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993). Essentially, the error would be equivalent to a "structural defect," which requires automatic reversal of a conviction because it amounts to more than simply an error in the trial process, but rather affects the entire trial's framework, thereby undermining the reliability of the trial to serve its central "function as a vehicle for determination of guilt or innocence." *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (199l). Such a situation is not presented in this case.

> the jury's consideration. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.
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> This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded as generally acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

Kotteakos, 328 U.S. at 764 (citations omitted). If the court is convinced upon review of the entire record that the error did not influence the jury, or had but slight effect, the conviction must stand. *Id.* On the other hand, if the court is left "in grave doubt" and "cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error," the court must find that the error had substantial influence on the jury and the conviction cannot stand *Id.* at 765; see also *0'Neal v. McAninch,* 115 S.Ct. 992,994 (1995).

Petitioner's claim stemming from the prosecutor's comments made in reference to the twenty-five minute lapse in time before petitioner called the police does not amount to reversible error. As the Ohio Court of Appeals concluded, the remarks were improper and "dangerously close to reversible error." (Doc. 5, Ex. D, p.11). They reflected the prosecutor's personal beliefs about what occurred and what petitioner was thinking during the twenty-five minute period and contained "potentially inflammatory inferences which could not reasonably have been drawn from the evidence below." *Id.* However, as the

Ohio Court of Appeals also concluded, the remarks related solely to petitioner's conduct toward the victim who was killed, Philip Osborne. Petitioner was not found guilty of any wrongdoing with respect to Osborne. *Id.* It, therefore, appears from the jury's ultimate verdict that the remarks had little, if any, influence on its determination.

Petitioner's claim that the prosecutor improperly commented on his failure to testify or on his right to remain silent also does not constitute reversible error. The challenged comment did not reflect on petitioner's failure to take the stand at trial. Rather, it appears the remark referred to petitioner's failure to respond to police questioning during the investigation prior to his indictment. Under *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the prosecutor is prohibited from using for impeachment purposes a criminal defendant's silence following his arrest and receipt of warnings pursuant to *Miranda V. Arizona,* 384 U.S. 436 (1966). *See Brecht,* 507 U.S. at 628. Such impeachment is considered fundamentally unfair because the *Miranda* warnings informing the arrestee of his right to remain silent, that anything he says may be used against him, and of his right to an attorney before submitting to interrogation, implicitly assure him that his silence will not be used against him at trial. *Doyle,* 426 U.S. 617-19; *see also Anderson v. Charles,* 447 U.S. 404, 407-08 (1980). The *Doyle* rationale has been formed to apply to statements made by a person before his arrest but after *Miranda* warnings are given. *Fencl v. Ahrahamson,* 841 F.2d 760, 764-65 (7th Cir. 1988); *see also Kappos* v. *Hanks.* 54 F.3d 365, 368-69 (7th Cir. 1995).

In this case, the prosecutor's vague comment suggesting petitioner failed to 'answer many questions" when in the presence of his attorney could have improperly referred to taped interviews conducted on August 28 and September 1, 1981 before petitioner's arrest, but after he had received *Miranda* warnings. *(See* Doc. 11, pp. 408-12; Doc. 12, pp. 606-91). However, the comment was an

isolated, passing remark. Moreover, it is highly doubtful the jury gave it much weight given the admission into evidence of the taped interviews clearly showing, contrary to the prosecutor's assertion, that petitioner waived his *Miranda* rights and responded fully to the police officers' questions, providing a detailed account of the events that occurred at the junk yard on August 28, 1981.

Petitioner further argues that this remark about not cooperating with the police, as well as other inflammatory comments about giving petitioner a medal for being a "lousy shot," electing petitioner sheriff aud petitioner not being Jesus Christ or Harry Houdini, caused the jury to return a political verdict against petitioner, rather than a verdict based on the evidence. The challenged comments were unnecessarily inflammatory in nature. However, they appear to have had little, if any, impact on the jury's deliberations. Indeed, the verdict does not reflect that the jury was swayed by political concerns to convict petitioner of an offense in order to keep him locked up, but on the contrary, exhibits a sensitivity to petitioner's position. Petitioner was acquitted of any wrongdoing with respect tile victim who was killed, even though the jury could have convicted petitioner of the lesser-included offense of voluntary manslaughter if not the charged murder offense. Petitioner also was acquitted of the more serious attempted murder charges with respect to the two injured victims. The verdict of guilty for felonious assault, as a lesser-included offense to attempted murder, was reasonable in light of the evidence presented at trial, *see supra* pp. 23-25, and shows that the jury deliberated in a reflective manner with some degree of sympathy toward petitioner rather than out of passion or political motivation against him.

Nevertheless, the Court is deeply troubled by the prosecutor's numerous comments on rebuttal to the effect that petitioner created the situation leading to the shootings. Petitioner claimed self-defense at trial. One of the elements of self-defense

petitioner had the burden of proving was that he played no part in creating the situation giving rise to the criminal charges. *(See* Doc. 14, p. 897). The trial court advised the parties prior to closing arguments that it would instruct the jury as a matter of law that petitioner had established the element and "was not at fault in creating the situation in the salvage yard on August 28, 1981." *(Id.,* p. 836). However, the prosecutor ignored the court and proceeded to repeatedly suggest otherwise in rebuttal closing argument, to which defense counsel had no opportunity to respond. The remarks were highly improper and flagrant. They had a tendency to mislead the jury into believing the issue decided as a matter of law in petitioner's favor was an unresolved question for the jury to decide. In addition, the remarks were extensive, constituting a substantial portion of the rebuttal argument. *(See id.,* pp. 882-886). Finally, the remarks were deliberate, as evidenced by the fact that the prosecutor was on notice prior to closing arguments that the issue was not to be considered by the jury.

The question is close as to whether the comments require the reversal of petitioner's conviction. The jury was instructed to consider petitioner's self-defense claim when deciding whether or not to convict him of the lesser-included felonious assault offenses for which he was ultimately convicted. *(See id.,* p. 908). Neither petitioner's counsel nor the court intervened at the time the comments were made to ensure the jury would not be misled into considering the element of self-defense already decided in petitioner's favor. However, on the other hand, the trial judge instructed the jury after closing arguments that "defendant had no part in creating this situation" and thus had established the element of self-defense. The court also instructed the jury that "[t]he evidence does not include . . . closing arguments of counsel." *(Id.,* pp. 895, 897). These instructions reduced the risk that the jury would be prejudicially influenced by the prosecutor's improper remarks. Moreover, most importantly, upon review of the entire record, it appears from the final verdict that the remarks did not

have a substantial prejudicial effect or influence on the jury's determination of guilt for felonious assault.

Under Ohio law, a person possesses the right to defend himself and his property by the use of such force as circumstances require to protect himself against such danger as he has good reason to apprehend. *State v. Williams,* Nos. C-910583 and C-910582, 1992 WL 247549, at *1 (Ohio Ct. App. Sept.30, 1992) (per curiam) (quoting *State v. McLeod*, 80 N.E.2d 699, 700 (Ohio Ct. App. 1948)), *appeal denied,* 607 N.E.2d 845 (Ohio 1993). The measure of that force depends on the nature of the assault taken together with all other circumstances. *Id.* When the accused has employed a deadly weapon, his use of such force may be justified on the ground of self-defense only upon proof that (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and his only means of escape from such danger was the use of the force employed; and (3) he did not violate any duty to retreat or to avoid the danger. *State v. Williford,* 551 N.E.2d 1279, 1281 (Ohio 1990); *State v. Robbins,* 388 N.E.2d 755, 758 (Ohio 1979). When one uses a greater degree of force than is reasonably necessary under all the circumstances to repel the attack, it is not justifiable under the theory of self-defense. *Williams*, *supra* at * 1 (quoting *McLeod,* 80 N.E.2d at 700); *see also Williford*, 551 N.E.2d at 1281.

Petitioner's strongest argument for having acted in self-defense was with respect to the boy who was killed, Philip Osborne. Evidence was presented that Osborne, who was the "lead figure" coming toward petitioner, "continued to advance" after petitioner began firing his rifle and even after Osbome was shot in the shoulder by petitioner. Petitioner was acquitted of any wrongdoing toward Osborne, which suggests the jury may have accepted petitioner's self-defense claim with respect to Osborne or, at least, demonstrates the jury was not prejudicially influenced

by the prosecutors comments when reaching its verdict on the murder charge and the lesser-included voluntary manslaughter offense.

In contrast, no evidence was presented to justify for purposes of self-defense the continued use of deadly force against the boys who were wounded by shrapnel. Indeed, no evidence was presented that the injured boys did anything but dive for cover and run to exit the junkyard after the shooting started. In his statements to the police, petitioner himself acknowledged that he "lost them," that they "escaped," and that he "attempted to pursue the two." (*See* Doc. 11, pp. 419-20; Doc. 12, pp. 641-45). After the first series of shots were fired, petitioner proceeded after the fleeing boys for approximately thirty-two (32) feet, firing his rifle in their direction ten more times until the ammunition was exhausted. Petitioner stated that he did not know whether "the other two suspects had weapons or not" and that he was concerned about being outnumbered "with an empty rifle magazine and only six shots left in [his] pistol." (Doc. 11, p. 419-21). However, in light of the evidence that the injured boys disappeared and did not continue to advance on petitioner, such concerns are insufficient to support a bona fide belief that the boys posed an imminent danger of death or great bodily harm to petitioner. Moreover, petitioner's admitted pursuit of the fleeing boys undermines any possibility that petitioner held a bona fide belief that his only means of escaping danger was by the use of deadly force against them. Such evidence of pursuit also demonstrates that petitioner failed to avoid the danger posed by the boys and employed a greater use of force against them than was reasonably necessary under the circumstances.

In sum, the Court concludes that although the prosecutor overstepped the bounds of propriety and engaged in flagrant misconduct when he repeatedly suggested to the jury that it could decide an element of self-defense resolved in petitioner's favor as

a matter of law, the misconduct did not have a substantial injurious effect or influence in determining the jury's ultimate verdict of guilt on the lesser-included felonious assault offense to attempted murder. Although the jury was allowed to consider self-defense in reaching its verdict on the felonious assault offense, under the evidence presented at trial, it could not possibly have found that the use of deadly force against the fleeing victims, who concededly had created the situation by entering petitioner's junk yard to steal items, was justifiable.

In so concluding, the Court emphasizes that it does not condone the prosecutor's conduct during rebuttal closing argument, where numerous misleading, inflammatory and highly improper statements were made. Indeed, if petitioner had been convicted of murder or involuntary manslaughter with respect to the victim who was killed and of attempted murder with respect to the boys who were injured, "grave doubt" would exist as to whether the jury's judgment was swayed by the prosecutor's misconduct and the conviction would not be allowed to stand. *See Kotteakos,* 328 U.S. at 764; *see a/so O'Neal,* 115 S.Ct. at 994.

B. Petitioner's Claim Alleged In Ground Two Challenging The Jury Instructions On The Intent Element Of Felonious Assault Lacks Merit

In Ground Two of the petition, petitioner claims that the jury instructions regarding the mental culpability requirement of the offense of felonious assault, as codified in Ohio Rev Code § 2901.22(B), violated his right to due process of law in this case where he asserted the defense of self-defense. (Docs. 1, 28).

Ohio Rev. Code § 2903.11(A) defines the crime of felonious assault in relevant part as follows: "No person shall knowingly . . . cause or attempt to cause physical harm to another by means of a deadly weapon or dangerous ordnance. . . ." The

term "knowingly" is defined in Ohio Rev. Code § 2901.22(B) as follows: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." In this case, the jury was charged with the statutory definition of "knowingly" and was instructed to apply the definition to the charge of felonious assault as a lesser-included offense to attempted murder. *(See* Doc. 14, pp. 901-902, 906-07). Petitioner contends the use of the words "regardless of purpose" in defining the mens rea element of the felonious assault offense precluded the jury from considering his self-defense claim, which required him to show there was a "purpose" to defend himself that justified his use of force. Petitioner further contends the definition shifted to him the burden of disproving the intent element of the felonious assault offense.

The Ohio Court of Appeals addressed the merits of this argument and found that it lacked merit. The court reasoned in relevant part as follows:

> Pleading and proving self-defense does not, as argued by appellant in his brief, require the negation of any of the elements of felonious assault. Appellant asserts that in order to prove self-defense he was required to disprove the "knowingly" element of the crime of felonious assault.... He urges that because the definition of knowingly contains the language "regardless of purpose," the burden of proof as to mental state shifts to a defendant attempting to plead self-defense, because such defendant is then required to prove that there was a purpose for his conduct i. e. to protect his person. We do not find appellant's argument persuasive for two reasons. First, in order to prove self-defense, the accused is not required to state the purpose behind his actions.

> Second, even assuming arguendo that proof of purpose is required in order to assert the defense of self-defense, the mental state required for felonious assault, "knowingly," is defined by statute in terms of conduct regardless of purpose.... If no purpose need be proven to obtain a conviction for felonious assault..., requiring purpose to be proved to establish self-defense would not require the negation of an element of felonious assault, and could not be construed to violate the appellant's right to due process of law.

(Doc. 5, Ex. D, pp.13-14) (citations omitted).

This Court agrees with the Ohio Court of Appeals' reasoning. It is well-settled that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364 (1970). States may not shift the burden to the defendant to disprove an element of a crime. *Rhodes v. Brigano,* 91 F.3d 803, 807 (6th Cir. 1996) (citing *Patterson v. New York,* 432 U.S. 197, 206-07 (1977)), *cert. denied,* No.96-8061, 1997 WL 106712 (U.S. June 2, 1997). However, the Sixth Circuit has expressly held that self-defense does not negate the mental element of"knowledge" as defined in Ohio Rev. Code § 2901.22(B). *Thomas v. Arn,* 704 F.2d 865, 875-76 (6th Cir. 1983). "A person may act 'knowingly' and still act in self-defense." *Id.* at 876 and n.14.

In any event, due process is not violated simply because proof of an affirmative defense, on which the defendant bears the burden of proof, may tend to negate an element of the crime charged. *Rhodes*, 91 F.3d at 807; *see also Martin v. Ohio,* 480 U.S. 228, 234 (1987). In *Martin,* the Supreme Court upheld the constitutionality of Ohio's practice of placing the burden of

proving self-defense on the defendant in an aggravated murder case. The Court rejected petitioner's argument that due process was violated because the elements of aggravated murder and self-defense overlap "in the sense that evidence to prove the latter will often tend to negate the former." *Martin,* 480 U.S. at 234. The Court reasoned:

> It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established.

Id.

The same reasoning applies to this case. The jury was not precluded from considering petitioner's self-defense claim based on the intent element required to establish the offense of felonious assault under Ohio law. Although a showing of purpose by the

State was not necessary to establish the intent element of felonious assault, and although the jury may have been convinced beyond a reasonable doubt that petitioner had committed the crime of felonious assault, the jury could still consider whether petitioner had shown by a preponderance of the evidence that the assault was justified on the ground of self-defense. The jury also was not precluded from considering evidence offered by petitioner in support of his self-defense claim as creating a reasonable doubt about the intent element of felonious assault even if such evidence was insufficient to prove self-defense by a preponderance of the evidence. The jury instructions, read as a whole, required the State to prove beyond a reasonable doubt each of the elements of the felonious assault offense. The burden of proof with respect to these elements did not shift to petitioner.

Accordingly, the Court concludes that the jury instructions on the intent element of felonious assault, made in accordance with the Ohio Rev. Code § 2901.22(B), did not violate petitioner's right to due process.

C. Petitioner's Sufficiency of Evidence Claim Alleged In Ground Three Lacks Merit

In Ground Three of the petition, petitioner claims there was insufficient evidence to support his felonious assault convictions, because he established all the elements of self-defense as a matter of law. (Docs. 1, 28).

The Due Process Clause requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In Re Winship,* 397 U.S. 358, 363-64 (1970). When petitioner raises an insufficiency of evidence claim in a petition for a writ of habeas corpus, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia* 443 U.S. 307, 319 (1979) (emphasis in original). This standard does not mean that the reviewing court must be convinced by the evidence of the petitioner's guilt beyond a reasonable doubt. *Scott v. Perini,* 662 F.2d 428, 431 (6th Cir. 1981), *cert. denied,* 456 U.S. 909 (1982). Nor does this standard require the State to rule out every hypothesis except that of guilt beyond a reasonable doubt. *Id.* at 431-32.

The *Jackson* standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Scott,* 662 F.2d at 432 (citing *Jackson,* 443 U.S. at 324 n.16). However, the Constitution does not require, as was required under Ohio common law in effect at the time of petitioner's trial and conviction, that where circumstantial evidence alone is relied upon by the jury in finding an essential element of the crime charged, "it must be consistent only with the theory of guilt and irreconcilable with any reasonable theory of innocence." *York v. Tate,* 858 F.2d 322, 326-30 (6th Cir. 1988) (per curiam) (quoting *State v. Kulig,* 309 N.E.2d 897, 899 (Ohio 1974)), *cert. denied,* 490 U.S. 1049 (1989).[3]

The reviewing court must view the evidence and the inferences to be drawn therefrom in the light most favorable to the prosecution. *Stacy v. Love,* 679 F.2d 1209, 1213 (6th Cir.), *cert. denied,* 459 U.S. 1009 (1982) (citing *Fuller v. Anderson,* 662 F.2d

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[3] On July 3 1, 1991, the Ohio Supreme Court overruled *Kulig* to the extent the case held that when the State relies on circumstantial evidence to prove an element of the offense charged, the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction. *See State v. Jenks,* 574 N.E.2d 492 (Ohio 1991).

420, 423 (6th Cir. 1981), *cert. denied,* 455 U.S. 1028 (1982)). Any conflicting inferences arising from the record must be resolved in favor of the prosecution. *Walker v. Engle,* 703 F.2d 959, 969-70 (6th Cir.), *cert. denied,* 464 U.S. 951, 962 (1983). It is beyond the province of the court to weigh the credibility of witnesses, and credibility conflicts must be resolved in favor of the prosecution. *Id.* It is the jury's responsibility as the trier of fact to resolve conflicts in testimony and to weigh the evidence. *Jackson,* 443 U.S. at 319. Consequently, the reviewing court may not substitute its own opinion for that of the jury which convicted the petitioner. *Id.* at 318-19; *York,* 858 F.2d at 329.

In Ohio, the crime of felonious assault is established by a showing that the accused knowingly caused physical harm to another by means of a deadly weapon. Ohio Rev. Code § 2903.11(A). In this case, the State presented sufficient evidence from which a jury could reasonably conclude that petitioner was guilty beyond a reasonable doubt of each count of felonious assault. Petitioner does not dispute that he utilized deadly weapons, i.e., a semi-automatic rifle and automatic pistol, or that he caused physical harm to Dodson and Oberschlake from shrapnel stemming from his use of those weapons. The State also presented sufficient evidence to establish that petitioner acted with the requisite knowledge, which is defined in Ohio Rev. Code § 2901.22(B) as awareness that "one's conduct will probably cause a certain result or will probably be of a certain nature." It is undisputed that petitioner fired his weapons at Osborne, Oberschlake and Dodson when he saw them approaching him in the junk yard. From this evidence alone, the jury could reasonably infer that petitioner acted with knowledge that his conduct would cause physical harm to the intruders. Moreover, as the Ohio Court of Appeals recognized in addressing the merits of petitioner's sufficiency of evidence claim *(see* Doc. 5, Ex. D, p. 15), conflicting evidence was presented as to whether or not petitioner fired a warning shot before shooting directly at the victims, which

also "bears heavily on [petitioner's] state of mind at the time of the shooting." The conflicting inferences arising from the record on this issue must be resolved in favor of the State. *See Walker*, 703 F.2d at 969-70.

Petitioner argues that he should not have been found guilty of felonious assault because he demonstrated that his actions were justifiable on the ground of self-defense. As discussed above, *see infra* pp. 19-20, petitioner's self-defense claim with respect to Oberschlake and Dodson is extremely weak. The record contains evidence that petitioner pursued and continued to fire at the injured boys as they fled from the junk yard. The jury could reasonably infer that the use of deadly force was not justifiable in light of this evidence, which suggests: (1) petitioner could not have held a bona fide belief that he was in imminent danger of death or great bodily harm or that his only means of escaping from danger was by the use of deadly force against the fleeing boys; (2) petitioner failed to avoid the danger posed by the boys; and (3) petitioner employed a greater use of force against them than was reasonably necessary under the circumstances. The evidence, therefore, was insufficient to demonstrate as a matter of law all the elements necessary to establish a claim of self-defense.

Accordingly, the Court concludes there was sufficient evidence presented at trial to support petitioner's felonious assault convictions and that the evidence was insufficient to establish petitioner's self-defense defense as a matter of law. Ground Three of the petition should, therefore, be denied on the merits.

D. Petitioner's Inconsistent Verdict Claim Alleged In Ground Four Lacks Merit

In Ground Four of the petition, petitioner claims he was denied due process when the trial court entered judgment on the

jury's verdicts, which were inconsistent. (Docs. 1, 28). Petitioner contends he established self-defense with respect to the murder and attempted murder charges for which he was acquitted and, therefore, also should have been acquitted of felonious assault.

The Ohio Court of Appeals addressed this issue on direct appeal and found that the verdicts were not inconsistent and were supported by the evidence because the "jury could reasonably have found that [petitioner] was acting in self-defense when he killed Osborne, who was leading the excursion into the junkyard, but was not acting in self-defense and using unjustified force as he continued to fire upon Dodson and Oberschlake as they ran from the scene of the confrontation." (Doc. 5, Ex. D, p. 16). This Court agrees with the Ohio Court of Appeals' ruling on this issue.

Moreover, it is well-settled that a criminal defendant may not challenge a verdict of guilt on one count solely because that verdict is not reconcilable with other verdicts rendered in his favor. *See, e.g., United States v. Powell,* 469 U.S. 57 (1984); *Dunn v. United States,* 284 U.S. 390 (1932); *United States v. Silva,* 846 F.2d 352, 357-58 (6th Cir.), *cert. denied,* 488 U.S. 911 (1988); *Vaughn v. Burke,* 940 F.2d 663 (table), Nos. 91-1343, 91-1361, 1991 WL 153090, at **2 (6th Cir. Aug. 9, 1991); *State v. Woodson,* 493 N.E.2d 1018 (Ohio Ct. App. 1985). Petitioner argues that the inconsistency in the verdicts may be considered as demonstrating there was insufficient evidence to support his felonious assault convictions. However, even assuming, *arguendo,* that the verdicts are inconsistent as petitioner contends, it does not necessarily follow that the jury was not convinced of the petitioner's guilt. *See Powell,* 469 U.S. at 64-65 (quoting *Dunn,* 284 U.S. at 393); *see also State v. Beehive Ltd. Partnership* 627 N.E.2d 592, 599 (Ohio Ct. App. 1993), *appeal denied,* 624 N.E.2d 1066 (Ohio 1994). "It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the [count resulting in conviction], and then through mistake, compromise, or lenity,

arrived at an inconsistent conclusion on the ... offense" resulting in acquittal. *Powell*, 469 U.S. at 65. As the Sixth Circuit reasoned in *Silva*,

> To accept [petitioner's] argument is to assume that [his] acquittal on the [one] count was proper--"the one the jury 'really meant.'" *Powell*, 469 U.S. at 68.... However, if the jury was mistaken, it is just as possible that it was mistaken in its acquittal . . . as in its conviction. . . . The jury could also have determined that [petitioner] was in fact guilty of the [offense for which he was acquitted], but that lenity was called for under the circumstances. However, whatever the reason for the verdicts, any speculation to that end is simply irrelevant in light of *Dunn* and *Powell*.

Silva, 846 F.2d at 358; *see also Powell*, 469 U.S. at 68 (explicitly rejecting the argument that an acquittal on one count necessitates a finding of insufficient evidence on the count resulting in conviction).

Accordingly, petitioner's claim raised in Ground Four of the petition challenging the jury's verdicts on the ground that they are inconsistent should be denied.

E. Petitioner's Claim Alleged In Grounds Five and Six Challenging The Lesser-Included Offense Jury Instructions Lacks Merit

In Grounds Five and Six of the petition, petitioner claims he was denied due process when the trial court instructed the jury on the lesser-included offenses of felonious and aggravated assault to the attempted murder charge even though he presented the complete defense of self-defense. (Docs. 1, 28). It appears

petitioner raised the claim for the first time to the Ohio courts in a post-conviction petition pursuant to Ohio Rev. Code § 2953.21, which was denied by the trial court on March 7, 1991. *(See* Doc. 5, Ex. J). Petitioner did not seek to appeal the trial court's decision. Because petitioner failed to raise the claim on direct appeal and did not appeal the trial court's decision in the post-conviction proceedings, the Court is concerned petitioner may have waived the claim for purposes of federal habeas corpus review. *See Murray v. Carrier,* 477 U.S. 478 (1986). However, because petitioner argues that his counsel's ineffectiveness constitutes "cause" for any default in the state courts, the Court will consider the merits of the claim. *See Coleman v. Thompson,* 501 U.S. 722, 750 (1991); *Murray,* 477 U.S. at 485.

Petitioner argues the instructions, which were made in violation of Ohio case law, invited the jury to reach a compromise verdict. This argument lacks merit.

The Court is not convinced that the instructions on the lesser-included offenses were made in violation of Ohio case law as petitioner contends. Under Ohio law, where the defendant is charged with a homicidal or physical assault crime and defends on the ground of self-defense, a charge on a lesser-included offense is warranted and required "not only for the benefit of the state, but for the benefit of the accused if the trier of fact could reasonably find against the state and for the accused upon one or more of the elements of the crime charged, and for the state and against the accused on the remaining elements, which, by themselves, would sustain a conviction on a lesser included offense." *State v. Parra,* 400 N.E.2d 885, 888 (Ohio 1980); *see also State v. Davis,* 451 N.E.2d 772, 775-76 (Ohio 1983). Felonious assault and aggravated assault are lesser-included offenses to attempted murder. *See* Ohio Rev. Code §§ 2903.11 and 2903.12 (1974 Committee Comment to H 511). Therefore, the lesser-included offense instructions were proper as long as "under any reasonable

view of the evidence it would have been possible for the jury, if they rejected [petitioner's] defense," to find that petitioner's conduct did not constitute attempted murder but instead amounted to felonious or aggravated assault. *See Davis,* 451 N.E.2d at 776.

In any event, to the extent petitioner alleges he is entitled to relief on the ground the instructions violated Ohio law, such a claim is not cognizable in this federal habeas corpus proceeding. A federal court may review a state prisoner's habeas corpus petition only on the ground that the challenged confinement violates the Constitution, laws or treaties of the United States. 28 U.S.C. § 2254(a). A federal court may not issue a writ of habeas corpus "on the basis of a perceived error of state law." *Pulley v. Harris,* 465 U.S. 37, 41 (1984); *Smith v. Sowders,* 848 F.2d 735, 738 (6th Cir.), *cert. denied*, 488 U.S. 866 (1988). A federal court does not function as an additional state appellate court reviewing a state court's decisions on state law or procedure. *Allen v. Morris,* 845 F.2d 610, 614 (6th Cir. 1988), *cert. denied,* 488 U.S. 1011 (1989). Only where the error resulted in the denial of fundamental fairness will habeas corpus relief be granted. *Cooper v. Sowders,* 837 F.2d 284, 286 (6th Cir. 1988).

Fundamental fairness concerns are not implicated in this case. Petitioner essentially argues that the lesser-included offense instructions amounted to error of constitutional magnitude because they encouraged the jury to reach a compromise verdict between those jurors who may have reached a verdict of guilt on the charged attempted murder offense and those jurors who may have accepted petitioner's claim of self-defense and voted to acquit. However, the giving of a lesser-included offense instruction, where warranted by the evidence, does not raise due process concerns. *See United States ex rel. Weismiller v. Lane,* 815 F.2d 1106, 1112-13 (7th Cir. 1987); *Hansborough v. United States,* 308 F.2d 645, 647-48 (D.C. Cir. 1962); *see also United States v. Alvarez,* 755 F.2d 830,851-52 (11th Cir.), *cert. denied*, 474 U.S.

905 (1985). Indeed, in such circumstances, failure to give a lesser-included offense instruction could constitute reversible error. *Alvarez*, 755 F.2d at 851-52 (and cases cited therein). Moreover, rather than encouraging compromise, "such instructions, by disclosing the full spectrum of criminal responsibility, may afford the jurors a better understanding of the gradation of responsibility in the law and thereby help their assessment of the case." *Lane*, 815 F.2d at 1113 (quoting *People v. Bailey*, 370 N.W.2d 628, 630 (Mich. Ct. App. 1985)). Only if the evidence precludes the possibility of guilt of a lesser-included offense will due process concerns be triggered by the giving of such instructions. *Hansborough*, 308 F.2d at 648.

Here, the evidence at trial warranted the giving of the lesser-included offense instructions. Evidence was presented reasonably supporting the inference that petitioner lacked the intent necessary for a finding of guilt on the attempted murder charge, but that his conduct satisfied the elements for a finding of guilt for a lesser-included offense. Petitioner's claim of self-defense could be and was asserted as a defense to the lesser-included offenses as well as to the attempted murder charge. *Contrast Parra*, 400 N.E.2d at 889 (holding that lesser-included offense instructions for assault and negligent assault in attempted murder case not required where the defendant claimed self-defense on the ground that he was justified in intentionally shooting the victim, which is inconsistent with an unintentional shooting).

Accordingly, the Court concludes that petitioner was not denied due process when the trial court instructed the jury on the lesser-included offenses of felonious and aggravated assault to the attempted murder charge.

F. Petitioner's Ineffective Assistance Of Appellate Counsel Claim Alleged In Ground Seven Lacks Merit

In Ground Seven of the petition, petitioner claims he was denied effective assistance of counsel when his trial counsel, who represented him on direct appeal, failed to object to or assign as error to the Ohio Court of Appeals eight leading questions posed by the prosecutor at trial; the jury instructions that were given on lesser-included offenses and that required the jury to acquit on the principal charge before considering lesser charges; and the cumulative effect of those errors. (Docs. 1; 28; 30, p.19). The Court assumes, *arguendo,* that petitioner has not waived this claim for relief due to any procedural default in the state courts.

To establish a claim of ineffective assistance of counsel, petitioner must show: (1) his counsel made such serious errors that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and (2) his counsel's deficient performance prejudiced the defense by undermining the reliability of the trial or direct appeal results. *See Strickland v. Washington,* 466 U.S. 668, 687 (1984).

Under the first prong of the *Strickland* test, petitioner must demonstrate that his counsel's representation fell below an objective standard of reasonableness based on all the circumstances surrounding the case. *See id.* at 688. Judicial scrutiny of counsel's performance must be highly deferential, and a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight" and to evaluate the challenged conduct from counsel's perspective at the time of the conduct. *Id.* at 689. In determining whether or not counsel's performance was deficient, the Court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *See id.*

In order to satisfy the second "prejudice" prong of the *Strickland* test, petitioner must show that a "reasonable

probability" exists that, but for his counsel's errors, the result of the trial or direct appeal would have been different. *See id.* at 694. Petitioner has met his burden if he shows that the decision reached by the jury or the Ohio appellate courts would "reasonably likely have been different absent the errors." *See* id. at 695.

The Court need not examine the question of whether counsel's performance was deficient before addressing the question of whether petitioner was prejudiced by counsel's performance. The Court may dispose of an ineffective assistance of counsel claim by finding that petitioner made an insufficient showing on either ground. *See id.* at 697.

In this case, petitioner has not demonstrated that his attorney provided ineffective representation. First, counsel's failure to object to or assign as error the eight leading questions posed by the prosecutor during the twelve day trial did not amount to error of constitutional dimension or undermine the reliability of the trial or direct appeal result. Such an objection would have only addressed the manner of the prosecutor's questioning. The prosecutor would have been allowed to obtain the elicited information in any event by way of direct questions.

Second, counsel's failure to object to or assign as error the jury instructions that were given on the lesser-included offenses did not constitute ineffective assistance. The Court has rejected petitioner's claim stemming from the giving of such instructions on the merits, and has concluded that the evidence at trial warranted the mstriictions. *See infra* pp.27-29. Indeed, the instructions could have worked to petitioner's benefit, and a failure to give them could have resulted in reversible error. Therefore, counsel did not commit any error in failing to object to the instructions, and no prejudice resulted from the challenged conduct.

Third, petitioner claims that counsel erred in failing to object to or assign as error jury instructions that required the jury to acquit on the main charge before considering lesser charges. The trial court instructed the jury in relevant part as follows:

> If you find that the state has proven by evidence beyond a reasonable doubt all of the essential elements of murder [with respect to Count One charging petitioner with murder], after considering the defense of self-defense, your verdict must be guilty of that crime and in that event you would not consider any lesser offense. (Doc. 14, p. 900).
>
> If you find that the state has proven by evidence beyond a reasonable doubt all of the essential elements of the charge of attempted murder as to Count Two and Count Three and after considering the defense of self-defense, your verdict must be guilty of that crime and in that event you will not consider any lesser offense. *(Id.*. p. 906).

It may have constituted error under state law for the trial court to direct the jury to not consider the lesser offense of voluntary manslaughter if it reached a finding of guilt on the charge of murder. *See State v. Oshurn,* 460 N.E.2d 314, 315 (Ohio Ct. App. 1983). However, even if the court's instructions amounted to error which should have been objected to by petitioner's counsel, they did not result in prejudice to the defense. Petitioner was acquitted of any wrongdoing (including the lesser-included offense of voluntary manslaughter) on the murder charge. Moreover, petitioner was acquitted of attempted murder.

Because petitioner was convicted of felonious assault, the only possibility of prejudice in this case would have been if the

jury were directed to not consider the aggravated assault offense, which carries a lesser penalty than felonious assault, if it reached a verdict of guilt for felonious assault as a lesser-included offense to attempted murder. *See State v. Carter*, 491 N.E.2d 709, 711-14 (Ohio Ct. App. 1985) (finding the trial court erred in instructing the jury that it must acquit the defendant of felonious assault before it could consider the lesser charge of aggravated assault). However, the court did not instruct the jury, as it did with respect to the murder and attempted murder charges, that a finding of guilt for felonious assault precluded consideration of lesser offenses. *(See* Doc. 14, p. 908, 916). Because no error occurred in the instructions given with respect to the felonious and aggravated assault offenses, the failure of petitioner's counsel to raise objections to the instructions either at trial or on direct appeal did not prejudice the defense and thus did not amount to ineffective assistance of counsel under the Sixth Amendment.

Finally, petitioner contends that the cumulative effect of counsel's errors amounted to ineffective assistance. For the reasons given above in rejecting petitioner's individual claims of attorney error, *see infra* pp. 31-32, this argument also lacks merit.

Accordingly, petitioner has failed to demonstrate he was denied effective assistance of counsel as guaranteed by the Sixth Amendment, and his claim raised in Ground Seven of the petition should be denied as lacking in merit.

G. A Certificate Of Probable Cause Should Issue

Prior to the enactment of the AEDPA, 28 U. S.C. § 2253 provided:

> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of

> arises out of process issued by a State court unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

This provision is applicable to this habeas corpus case, which was pending prior to the AEDPA's enactment. *See Lindh v. Murphy,* No.96-6298, 1997 WL 338568 (U.S. June 23, 1997).

The purpose of the certificate of probable cause is to separate meritorious from frivolous appeals. *Barefoot v. Estelle,* 463 U.S. 880, 892-893 (1983). However, probable cause means more than the lack of frivolity. *Id.* at 893. To secure a certificate of probable cause, petitioner must make a "substantial showing of the denial of a federal right." *Id.* While petitioner need not demonstrate that he will prevail on the merits, he must show; (1) the issues are debatable among reasonable jurists; (2) the appellate court could resolve the issues differently; or (3) the questions presented are "adequate to deserve encouragement to proceed further." *Id.* at 893 n.4.

This Court concludes that the prosecutorial misconduct issue presented in this case is subject to reasonable debate and could be resolved differently by the appellate court. The Court flirther finds that the questions raised are adequate to encourage petitioner to proceed to appellate review. Therefore, any application by petitioner for a certificate of probable cause should be GRANTED.[4]

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[4] The AEDPA amended § *2253* to require the issuance of a certificate of appealability instead of a certificate of probable cause in a habeas corpus proceeding "if the applicant has

(continued...)

IT IS THEREFORE RECOMMENDED THAT:

1. Petitioner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, as amended (Docs. 1, 28), be DENIED with prejudice.

2. Upon petitioner's application, a certificate of probable cause be issued.

Date: July 14, 1997

/s/ Timothy S. Hogan
Timothy S. Hogan
United States Magistrate Judge

---

[4] (...continued)
made a substantial showing of the denial of a constitutional right." 28 U.S.C.A. § 2253(c)(2) (West Supp 1996). Under the new law, the certificate of appealability shall indicate which specific issue or issues satisfied the required showing 28 U.S.C.A. § 2253(c)(3) (West Supp 1996). The Supreme Court's *Lindh* decision precludes this Court from retroactively applying the amended version of § 2253 to the case at hand. Nevertheless, the Court alternatively concludes that in the event a certificate of appealability is proper in this case, a certificate of appealability should issue only with respect io the prosecutorial misconduct claim raised in Grounds One and Six of the petition and should be denied with respect to the remaining claims raised in Grounds Two through Seven .

APPENDIX G - MEMORANDUM AND ORDER OF U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John Coyne,	)	
	)	
Petitioner,	)	Case No. C-1-94-704
vs.	)	
	)	
Harry Russell,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the Court upon Petitioner's objections to the July 15, 1997 Report and Recommendation of United States Magistrate Judge Timothy S. Hogan. Pursuant to that Report and Recommendation, Magistrate Judge Hogan recommended that Petitioner's petition for writ of habeas corpus, filed pursuant to 28 U.S.C. §2254, as amended (Doc. 1 and Doc. 28), be denied with prejudice. Petitioner's objections are, in great measure, reiterations of the arguments he raised in his memorandum in support of the petition. The Magistrate Judge addressed each of those arguments in his thorough analysis. Petitioner now argues, essentially, that the Magistrate Judge erred in each portion of his analysis.

The Magistrate Judge's Report and Recommendation were entered pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, Accordingly, this Court must consider de novo the portions of the Magistrate Judge's proposed disposition to which

specific objections have been made.

Having considered Petitioner's arguments de novo, the Court concludes that the Magistrate Judge correctly disposed of each of the issues raised before him. The Court concludes that no error intervened in his recommendation that Petitioner's petition for writ of habeas corpus be denied. Accordingly, the Court adopts the reasoning of the Magistrate Judge as entirely consistent with the Court's own analysis of the issues raised in the objections. Petitioner's objections are hereby **OVERRULED.** The Report and Recommendation is hereby **ADOPTED** in its entirety, and this action is **DISMISSED.**

IT IS SO ORDERED.

/s/ Sandra Beckwith
Sandra S. Beckwith
United States District Judge

APPENDIX H - JUDGMENT OF U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John Coyne

Plaintiff(s),

v. C-1-04-704

Harry Russell

Defendant(s).

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT PETITIONER'S OBJECTIONS ARE **OVERRULED** [DOC. 36] AND THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE IS **ADOPTED** IN ITS ENTIRETY [DOC. 35].

THIS ACTION IS **DISMISSED** PURSUANT TO ORDER OF THE COURT [DOC. 37].

September 4, 1997

Kenneth Murphy, Clerk
/s/ Tempann Thomas
Deputy Clerk

APPENDIX I - CERTIFICATE OF APPEALABILITY AND/OR PROBABLE CAUSE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

John Coyne,	)	
	)	
Petitioner,	)	
	)	Case No. C-1-94-704
vs.	)	
	)	
Harry Russell,	)	
	)	
Respondent.	)	

CERTIFICATE OF APPEALABILITY AND/OR PROBABLY CAUSE

Pursuant to 28 U.S.C. §2253, this Court hereby certifies for appeal Ground One and Six raised in the petition in this matter. Plaintiff's motion for such a certificate (Doc. 39) is hereby GRANTED.

IT IS SO ORDERED.

/s/ Sandra Beckwith
Sandra S. Beckwith
United States District Judge

APPENDIX J - TEXT OF OHIO REV. CODE § 2903.11

Ohio Rev. Code. §2903.11 FELONIOUS ASSAULT

(A) No person shall knowingly:

(1) Cause serious physical harm to another or to another's unborn;

(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.

(B) Whoever violates this section is guilty of felonious assault, a felony of the second degree. If the victim of the offense is a peace officer, as defined in section 2935.01 of the Revised Code, felonious assault is a felony of the first degree.

APPENDIX K - TEXT OF OHIO REV. CODE §2901.22

Ohio Rev. Code § 2901.22 CULPABLE MENTAL STATES

(A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature.

(B) A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

(C) A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(D) A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

(E) When the section defining an offense provides that negligence suffices to establish an element thereof, then recklessness, knowledge, or purpose is also sufficient culpability for such element. When recklessness suffices to establish an element of an offense, then knowledge or purpose is also sufficient culpability for such element. When knowledge suffices to establish an element of an

offense, then purpose is also sufficient culpability for such element.

(2)

Supreme Court, U.S.
FILED
APR 26 1999
OFFICE OF THE CLERK

No. 98-1546

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JOHN COYNE,
Petitioner,

v.

GARY MOHR,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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5RP

QUESTIONS PRESENTED

1. In affirming the denial of habeas relief, did the court of appeals properly apply this Court's well-established harmless error test?

2. Where the district court that denied the petitioner's various habeas claims in this pre-AEDPA case found that only one of those claims was even debatable among reasonable jurists, and the court of appeals' opinion refers only to that claim and not to the other clearly non-meritorious ones, is certiorari warranted?

STATEMENT OF THE CASE

We agree with Petitioner's statement of the case. As he recounts in detail, he was tried and convicted of two counts of felonious assault, and those convictions were affirmed on direct appeal. His efforts to overturn the convictions through Ohio's post-conviction relief procedures proved unsuccessful, and now a U.S. magistrate judge, U.S. district judge and the Sixth Circuit have found no merit to his federal habeas claims.

REASONS FOR DENYING THE WRIT

A. The Sixth Circuit Adhered To Well-Settled Law When It Rejected Petitioner's Claim of Prosecutorial Misconduct, And There Is No Lower Court Split of Authority On The Question.

As the Court has made clear, "a federal court may grant habeas relief based on trial error only when that error 'had a substantial and injurious effect or influence in determining the jury's verdict.'" *Calderon v. Coleman*, 119 S. Ct. 500, 503 (1998) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "[M]ere speculation" that such error occurred is insufficient. *Calderon*, 119 S. Ct. at 503. Rather, "the court must find that the defendant was actually prejudiced by the error." *Id.*

Here, the Sixth Circuit, in an unpublished opinion, reviewed a claim of trial-type error – an allegation of prosecutorial misconduct – and asked "whether the conduct was so egregious so as to render the entire trial fundamentally unfair." Pet. App. at 3 (quoting *Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir.), *cert. denied*, 118 S. Ct. 572 (1997)) (internal quotations omitted). Applying that standard to the facts of this case, the Sixth Circuit found that "the prosecutor's closing statements were not, as a matter of law, so prejudicial as to deny Coyne a fair trial." Pet. App. at 3.

That test is fully consistent with *Brecht* and its progeny, which describe trial-type error as "amenable to harmless-error analysis [in federal habeas cases] because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial." *Brecht*, 507 U.S. at 629 (quotations omitted). The Sixth Circuit made that assessment, as did the magistrate and district judges, and there is no important issue in the application of that undisputed test to the particular facts of this case that now warrants this Court's review, particularly where all of the judges below at both the circuit and district court levels reached the same conclusion: that the alleged prosecutorial misconduct was harmless.

And on his first question regarding the Sixth Circuit's analysis of that alleged misconduct, Petitioner conspicuously fails to allege any split of authority among the lower federal courts, and he cannot, for none exists. Rather, he simply argues that the Sixth Circuit misapplied this Court's harmless error test for reviewing trial-type errors in federal habeas cases. That claim does not present any ongoing legal problem demanding the Court's review, for not only is the law well-settled on the question, but the Sixth Circuit's test as applied in this case is consistent with both the test laid down by this Court and the similar standards followed by other lower federal courts. There is no conflict here, nor any issue warranting this Court's review.

B. The Sixth Circuit's Focus In Its Opinion On Only Two of Petitioner's Seven Habeas Claims Does Not Support Issuance of a Writ of Certiorari.

Petitioner seeks certiorari on his second question solely because the Sixth Circuit's opinion below speaks only to the one issue that was "subject to reasonable debate"

according to the magistrate judge who first looked at the case. Pet. App. at 67. In other words, he cries foul because the court of appeals' opinion does not refer to his other arguments – arguments that, according to the magistrate judge, were without merit and did not even meet the standards described in *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (requiring an unsuccessful habeas petitioner seeking appellate review of his claims to show that those claims are at least "debatable among jurists of reason" or could be resolved differently by a higher court).

No rules or cases require federal appellate courts, when reviewing pre-AEDPA habeas appeals under the former certificate of probable cause regime, to refer in their opinions to every frivolous argument that the habeas petitioner has raised. Yet that is the relief Petitioner seeks.

In the decision below, the Sixth Circuit focused on the one claim that the magistrate judge and district judge thought debatable, and then agreed with them that even it lacked merit upon closer examination. Petitioner's argument, if successful, would simply impose on the courts of appeals an obligation to add a tag line at the end of their opinions to the effect that "all of petitioner's remaining arguments are frivolous as the district court found." No such requirement exists, nor should it. Federal habeas is of course designed "to correct wrongs of a constitutional dimension," *Wainwright v. Goode*, 464 U.S. 78, 83 (1983), not the kind of not-even-debatable claims raised by Petitioner in addition to his prosecutorial misconduct claim.

Petitioner made his best arguments to the Sixth Circuit. That that court chose only to hone in on the strongest of his arguments in its opinion does not detract from the fact that he had a full and fair opportunity to present all of his claims – including the frivolous ones – in both the district

and circuit courts, and does not suggest that the Sixth Circuit overlooked some egregious constitutional error. Petitioner's federal claims have been fully aired and examined in both state and federal court, and every claim has been rejected by every judge who has looked at them. There is no issue here that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully submitted,

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April 26, 1999